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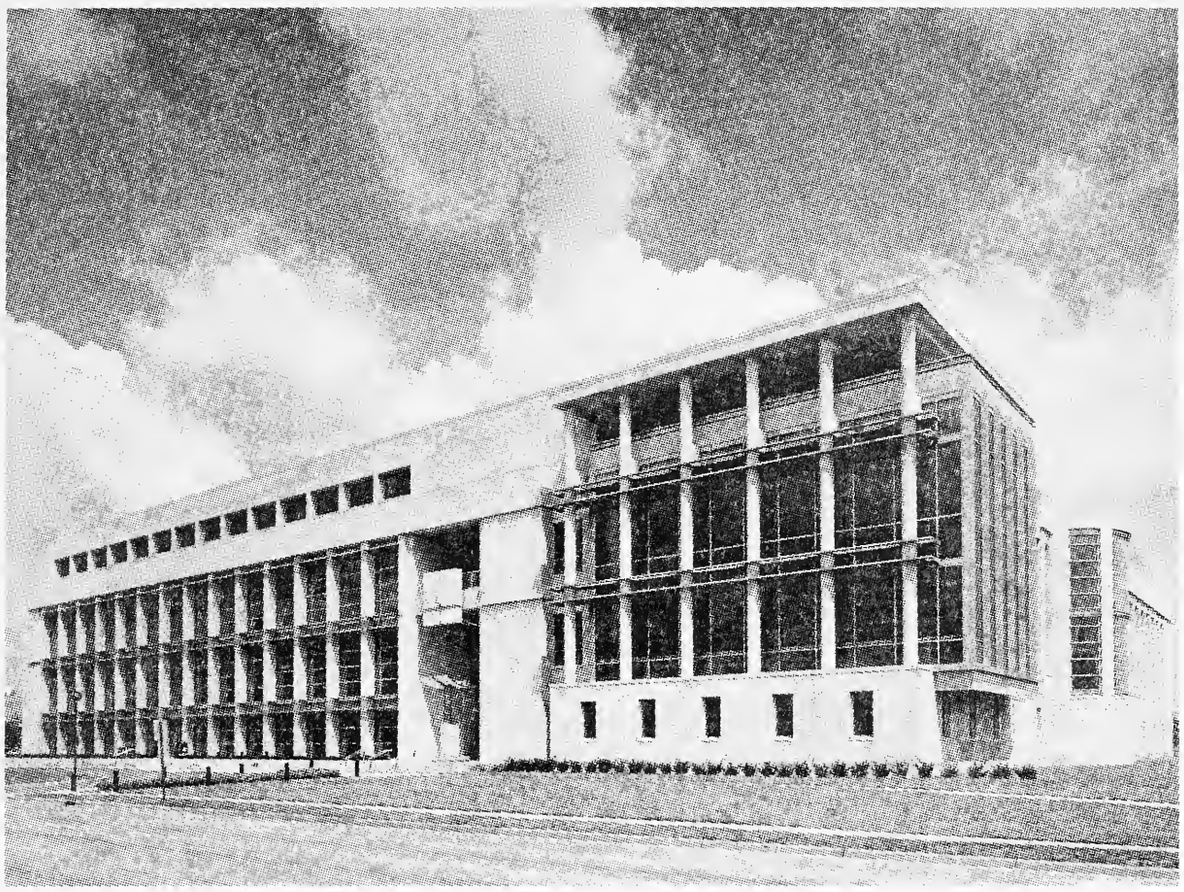

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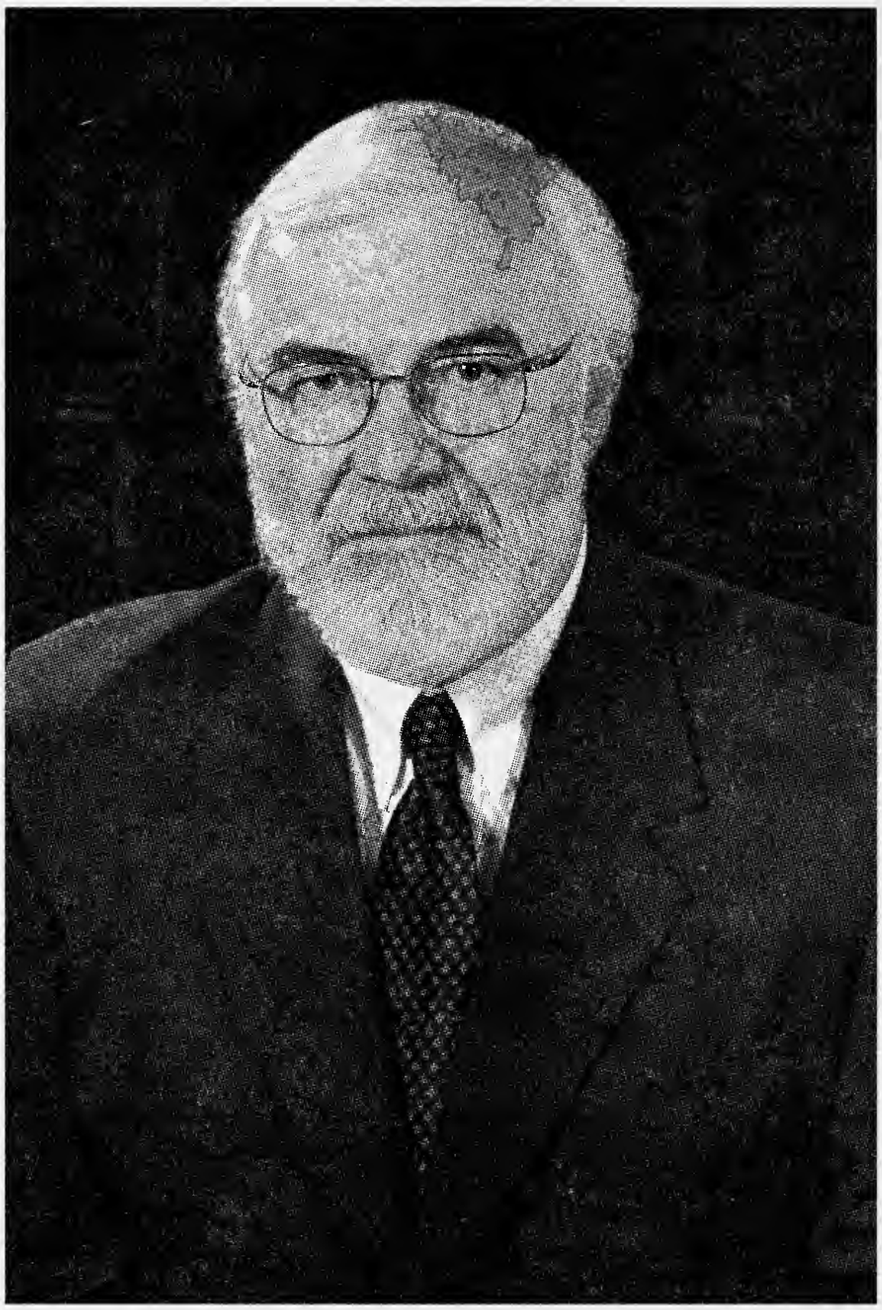

LAWRENCE P. WILKINS

Indiana Law Review

Volume 43 **2010** **Number 2**

TRIBUTES

A Letter from Gerald L. Bepko* and His Wife, Jean,** in Celebration of Sharon and Lawrence P. Wilkins Who Have Been Friends for Twenty-Nine Years

Dear Sharon and Larrie,

It seems like yesterday that we met, but it was more than twenty-nine years ago. That was when we recruited you, Larrie, from your appointment at the University of Akron. At that time Tom Read was Law Dean, I was Associate Dean for Academic Affairs and both of us, along with the faculty, were excited about your appointment.

Your academic work at Akron was excellent and you earned an appointment there with tenure in the regular course. Moreover, we didn't have as many lateral hires in those days and your experience seemed just right for IU at Indianapolis.

Not only were we attracted to your academic portfolio in 1979-80 including articles in places like the University of Cincinnati, Cleveland State, *Family Law Quarterly* and *Land and Water Law Review*, but you seemed to achieve excellence in your engagement with Ohio's professional community and in the larger communities in the population centers served by the University of Akron. Of particular interest was your work in the interconnections between law, health, and medicine. Among other things, you had organized and served as a panelist at a program for the Northeastern Ohio Universities College of Medicine on the "Moral/Ethical Issues in Modern Health Care: The Balance of Risks in Research." These strengths fit well with our Law School's long standing links with the Indiana University (IU) School of Medicine and our growing ambitions in Health Law.

On top of all this there were some common experiences that you and I shared by way of an LL.M. program and previous teaching experience in a multi-division law school. Finally we were all struck by your very serious, thoughtful approach to your fields of study.

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* Former Interim President of Indiana University, 2003; Indiana University-Purdue University—Indianapolis (IUPUI) Chancellor Emeritus, Indiana University Trustees, Professor and Professor of Law; former Dean of the Indiana University School of Law—Indianapolis, 1981-86.

Gerald L. Bepko and his wife, Jean, sent this letter on November 15, 2008, to Sharon and Lawrence P. Wilkins on the occasion of his retirement from the Indiana University School of Law—Indianapolis. It has been expanded to include a few additional thoughts and is being resent as part of the tribute to Professor Wilkins.

** Jean Bepko served as Special Assistant in the Office of the Chancellor of IUPUI and in the Office of the President of Indiana University.

Thereafter, Larrie, we worked together at the School for about six years. During five of those years I was the dean which, because of schedule demands, made it more difficult to have the kinds of relationships that colleagues with similar backgrounds would normally develop. Still, I remember fondly the times we had together including your debut as a player of some considerable skill on the faculty touch football team; although, as I recall, by the time you joined the faculty the game had passed me by or, to put it more charitably, I was on injured reserve.

After 1986 when I joined the IUPUI administration ("University"), I saw less of you on campus, but kept abreast of the School through Jeff and then Norm. They commented often on the leadership role you naturally assumed and how important you were to the success of the academic program. As a leader among faculty you took your share of the executive assignments such as Associate Dean and, reflecting your interest in new technologies, as webmaster and Director of Legal Management Systems.

From a vantage point in the University administration I observed your external work develop in Indiana just the way it had in Ohio. You did your fair share of high quality continuing legal education work for the Indiana bar and you continued your work on the interface between law and health. Your interest in technology has also been visible from afar, especially your long involvement with the National Center for Computer Assisted Legal Instruction where you've served since 1997 on the Board of Editors. Also of interest was your leadership in the Symposium issue of the Indiana Law Review in 1997 on "Law and Technology in the New Millennium: Closing the Gap."

One special event in your life came to my attention in the first or second year that I was chancellor. It came to me in the form of a request for a sabbatical leave which you spent as a Visiting Professor at Monash University in Australia. This overseas venture enriched and added an international dimension to your already formidable teaching repertoire. It also continued in fine fashion the links our faculty have had with Monash University.

Another very special dimension of your work was visible to all in the University administration. You have served in extremely able fashion on the University's Institutional Review Board for Research Involving Human Subjects. This was a very important function of the University when you became a member of the Review Board in 1988, and it became even more important over the years as the human subject issues became more complex. Your work became increasingly important as the number of complex cases from the School of Medicine increased, the volume of research activity expanded dramatically, and there was an enormous growth in resources devoted to research. This continues to be one of the most important areas in which we must achieve excellence, and your long service of more than twenty years, and the leadership you provided, have been very important to our success.

Along the way I've also heard from your former students what a deep and positive impression you've made in the profession. Being out in the larger community I sometimes heard more about the School than when I was dean, because people saw me as independent of the School. You should be proud of the way people think of you in this state.

My respect for you and the fond recollections of our time together as law faculty were part of the reason I was so pleased to join the "reading group" of elder, mostly retired, faculty that includes you, Jim Torke, Jeff Grove, and Paul Cox. It has been uplifting and enjoyable to be a part of this group with you and I was especially taken by the book by Robert Nagel that you suggested for the session we had just before I first wrote this letter in November 2008.

While I didn't see you at the Law School very much over the years, Larrie, Jean and I did see both of you at St. Luke's United Methodist Church. Larrie, you and I have sat together many times, even in the last month or two, at the Sunday services. Of course all at St. Luke's have seen and heard you, Sharon, in the New Song Ensemble.

For me one of the most memorable musical moments at St. Luke's—a church known for the excellence of its music—was when New Song performed a wonderful adaptation of the traditional hymn titled "Morning has Broken," a hymn introduced into popular culture by Cat Stevens in 1971. The New Song adaptation is much better than the Stevens' version although both are moving.

Sharon, you've also come into our lives by way of your wonderful work as a second grade teacher at the Fox Hill School. Jean was a teacher's assistant in reading in your classroom at the Fox Hill School for a number of years and holds those teaching experiences to be among her most cherished along with her twenty-six years of teaching in the St. Luke's Sunday School. From her experience in your School and in your class room, Sharon, Jean, and I have come to admire you very much. If Larrie's following among alumni of the Law School is to be eclipsed in any way it would be by the following of your former students and their grateful parents and grandparents.

I'll bet you've had the same experience as Jean and I when out at dinner or in some other public space in Indianapolis. Someone we don't immediately recognize will approach our table with the intent of saying hello. At least as often as it involves some aspect of our work in the University, and perhaps more often, it is a parent, grandparent, or especially a former student of Jean's who will say something like, "Mrs. Bepko, I was in your Sunday School class at St. Luke's."

Both Jean and I hope that we'll see more of you now that you're moving to the next stage of life. Of course we both hope that this next stage is particularly joyful and that you and your family are as happy as it is possible to be.

Sincerely,
Jerry Bepko in collaboration with his partner of forty-one years, Jean Bepko

AN APPRECIATION OF LARRIE WILKINS

PAUL N. COX*
SUSANAH M. MEAD**

We are honored to have been asked by the editors of the *Indiana Law Review* to record a few words about our friend and colleague, Larrie Wilkins, upon the occasion of his retirement.

It is customary in a tribute such as this to recount milestones in the career of the person honored, but we will only briefly summarize these. Of more importance is what Larrie meant to us as his colleagues, to the law school, and to his students.

Lawrence P. Wilkins was appointed by the Indiana University School of Law—Indianapolis as an Associate Professor in 1980. Prior to this appointment, he had served as an associate professor of law at the University of Akron School of Law (1974-1980). Larrie achieved full professorial rank in 1983 and was named the William R. Neale Professor of Law in 2003.

During the course of his twenty-eight years at this law school, in addition to his faculty responsibilities, Larrie has served as Associate Dean for Academic Affairs (1988-1990), as Director of the Program for Management of Legal Information Systems (1997-2000), and as chair or a member of numerous faculty committees and task forces. His tireless efforts on the Building Committee during the planning stages of Inlow Hall are in great part responsible for its beauty and functionality.

He served, as well, on several campus committees, and, significantly, devoted substantial time and effort as a member of the Indiana University-Purdue University at Indianapolis Institutional Review Board for Research Involving Human Subjects. On a campus with a major medical school and research facility, this Board serves a critical function. Larrie was an active member of the Board for many years, helping to develop policies and procedures for the use of human subjects in studies with experimental drugs. Although he was always clear with the Board that he was a member of the Board and not its legal counsel, he was instrumental in developing important policies and procedures, especially in sensitive privacy issues such as how health information could be used for research purposes. Members regularly discussed with him serious legal and ethical issues. He drafted the language on how subjects should be compensated if they were injured as well as the consent form that is still in use. On rare occasions when he was unable to attend a meeting and a difficult issue arose, someone would say, "what would Larrie do?" The fact that he was the only non-physician member of the Board ever to serve as a committee vice-chair speaks to the esteem in which he was held by his Board colleagues.

Larrie's scholarly interests included the law of torts, medical malpractice, technology, negotiation, remedies, and legal education. His several publications and numerous presentations on these and other subjects reached national,

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** Professor of Law, Indiana University School of Law—Indianapolis.

regional, and local audiences of academics and lawyers. Of particular note were his many significant contributions to the medical research enterprise through his service on the institutional review board described above and his many presentations to medical professionals regarding medical and legal issues. Larrie's efforts helped to forge important links between the law school and life sciences and contributed significantly to the school's health law center and programs. He was faculty advisor to the law school's nationally ranked *Health Law Review* and to students seeking their LL.M. in health law.

These milestones, again, however, are merely a few factual highlights. They fail to capture sufficiently the reasons for the great affection with which Larrie is held in the eyes of his colleagues and students. What are these reasons?

There is, first, Larrie's generosity in making himself available to and sympathetically engaging with all who sought his opinion and counsel. There were countless occasions on which he would interrupt his work to address issues raised with him by colleagues. If there were limits to this generosity, they were only those imposed by the priorities of his devotion to his students, with one or more of whom he was often engaged in patiently discussing matters related to his courses.

There is, second, Larrie's principled judgment. Colleagues and students would seek his opinion and advice precisely because they could expect this judgment. So, too, could colleagues in other departments and schools, particularly in the medical community. By principled judgment we mean that Larrie brought to these conversations both a sense of the relevant, the material, and the possible—the discernment of the good lawyer and a commitment to principle—the integrity of the good lawyer. Our emphasis on the qualities of the good lawyer are, we think, central to an understanding of Larrie's contributions, for Larrie was both an exemplar of the lawyer and an educator committed to instilling the qualities of the good lawyer in his students.

This rendered Larrie, as he recognized, "old school" in an era in which many in the legal academy have questioned the efficacy and even the reality of "thinking like a lawyer." Larrie believes passionately, however, in what many have questioned, and we testify to efficacy and reality in the example he established. In all of our many encounters with him and in all of the many encounters we observed, he brought to even the most complex and difficult matters an insistence upon the importance of facts and nuances of context, a capacity to identify the material issues and a talent for imposing order through persuasive analysis.

Larrie brought also, and perhaps most importantly, an insistence upon honest, civil, and reasoned discussion within a commitment to doing the right thing, and this is what we mean by the importance of principle to his thinking. Neither Larrie nor we are so naïve as to think "the right thing" always easily discerned or always free from contest or doubt, even though neither he nor we are so cynical as to believe it seldom discernible or always contestable and in doubt. We mean only that it is, in Larrie's eyes and in the example he set for us, that which should be sought, however painful the answer reached.

There is, third, Larrie's tireless devotion to service, both inside and outside the law school. We have touched upon his service to the university, campus, and

profession, but wish particularly to note his service within the law school. Legal academics bring a variety of important qualities to their profession, but the willingness and capacity to get things done within an institution devoted in large measure to faculty governance is, perhaps surprisingly, often rare. Larrie possessed in high measure these rare qualities. If there was to be a difficult and burdensome year in faculty recruitment or in curricular reform or in reviewing academic standards or in the myriad of other matters that come before the faculty, Larrie was the first choice of the person to chair the relevant committee or lead the appropriate task force. His many contributions to making the law school work are now significant parts of our institutional structure and practice.

Fourth, and finally, there is Larrie's complete commitment to being a legal educator. That commitment is evidenced by his large body of teaching materials, his experiments with and success in developing distance education courses and CALI (the Center for Computer Assisted Legal Instruction) exercises, his many hours of preparing for classes and many more hours of conferences with students, and the great esteem with which he is viewed by the school's alumnae. These, again, however, are facts that inadequately capture our point. That point is that Larrie was committed to the belief that the primary function and calling of the legal academic is teaching. And teaching was what Larrie did superbly well. His now literally thousands of former students, who may in the early weeks of the semester in a course taught by Larrie have entered the classroom door with great trepidation, having heard of the rigors of his classes, left it at the end of the semester with a sense of great good fortune for having had the opportunity to be taught by a master. The myriad notes, letters, poems, pictures and sculptures—including a beautiful Lego rendition of the famous train in *Palsgraf v. Long Island Railroad Co.*[1]—he received at the end of every semester attest to the esteem in which his students held him as well as the great affection they had for him. His habitual greeting to his first-year students, "good morning (or "afternoon" or "evening") Torts scholars," was fraught with meaning. His intent was to make each student immerse him or herself in the subject of the law of Torts in a way none of them had ever been immersed in a subject before. His gentle but demanding insistence on depth of reading, care in organization, and precision of thought made Torts scholars of all who allowed themselves to be led by him.

Larrie's teaching was not limited to the students who enter our doors each year and leave us three of four years later as educated lawyers. Some of his most important (and most appreciated) teaching has been the training of novice law professors in the art of teaching the uninitiated to become lawyers.

In 1981, when Larrie had been a Torts professor for a number of years but a Torts professor at our school for only a year, he took on two young disciples who had recently been recruited to teach Torts. One of these disciples is one of the authors of this tribute. The time and effort he devoted to teaching two neophyte law professors who had not seriously considered the law of Torts since their first-year Torts class, and who had never taught a substantive law class before, cannot

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1. 162 N.E. 99 (N.Y. 1928).

be measured. He spent endless hours discussing the subtleties of the law and how best to present it to students. He was always available to discuss cases, observe classes, and answer questions. Some of these questions no doubt displayed naïvety, perhaps stupidity. Nevertheless, to his eternal credit Larrie managed to answer and advise novices in a way that always made them feel respected as colleagues and considered as equals. This unselfish mentoring of young colleagues continued throughout his career.

It is impossible to capture the character of a three decade career in a few paragraphs especially one as full as Larrie's. Nevertheless, we hope that we have conveyed a sense of his importance to this law school. His retirement was a great loss to the law school as an institution and to his friends and colleagues personally. In closing, we would just like to say that we miss his presence in our midst but know that he will always remain a loyal and loving friend.

TRIBUTE TO PROFESSOR LAWRENCE P. WILKINS

JEFFREY W. GROVE*

HAIKU FOR LPW

A serious man,
Not to be taken lightly.
Yet, a ready smile.

Creative worker,
Diligent perfectionist,
Indefatigable.

Independent mind,
Singular self-possession,
Exemplary colleague.

Longtime, faithful friend,
Honest, trusted, loyal, true.
Character is all.

Devoted parent
With childhood sweetheart, Sharon—
Forty-one years, so far.

Emeritus status:
Life reorganized anew.
Larrie, Ascendant.

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* Professor of Law and Associate Dean Emeritus, Indiana University School of Law—Indianapolis.

TRIBUTE
LAWRENCE P. WILKINS

FLORENCE WAGMAN ROISMAN*

Despite Professor Wilkins' retirement from the law school, he is a continuing presence for me—and, I am sure, many others. I still think of the office he occupied as his office, though someone else is in it now, and I expect to see his door open and Professor Wilkins behind his desk, as he almost always was.

Professor Wilkins did many things well, but I remember him particularly for two aspects of his life and work, aspects that are inter-connected. The first was his dedication to teaching; the second, his commitment to this law school.

People who are not intimately familiar with the legal academy might think that legal education is focused on teaching, but this—alas!—is not true. Most law schools and most law professors are focused primarily on scholarship and are far more interested in the production of law review articles than in the care and nurturing of those who would become lawyers. I am glad to say that our law school is an exception to this general rule, and much of this is due to Professor Wilkins's influence.

With respect to hiring of faculty, Professor Wilkins was famous for five things. When he served on the Faculty Recruitment Committee, he played a crucial role in sketching each faculty candidate, which enabled those of us who have bad memories to sort out one candidate from another. He also authored three "Wilkins Rules": 1) that a person who was first in her or his class at any school is a candidate worthy of our consideration; 2) that a person who began but did not complete any program needed to have a good explanation for not finishing what s/he had begun; and 3) that anyone who offered to teach "any first year course" was someone who did not appropriately appreciate those courses. His fifth and most important contribution was his insistence on teaching ability as a priority. He helped to create the happy situation that this school, as an institution, truly does care about teaching, and has hiring and promotion standards that take teaching into strict account, so that virtually everyone on our faculty is a good teacher.

Professor Wilkins was interested in and knowledgeable about new technologies, and did pathbreaking work in developing lessons for law students for CALI (the Center for Computer-Assisted Legal Instruction). His early leadership in technology—he was founding editor and Webmaster of the law school's Web site, and wrote the first fully electronic text used at the law school—always was subordinate to the human interactions of students with one another and with the professors. He developed innovative and effective ways to teach his classes, and also worked hard to influence how the school as a whole structured its curriculum, set its priorities, and evaluated teaching. Having developed an effective way of teaching the six credit Torts class, he refused to teach Torts after the faculty voted to reduce Torts to a four credit course. I've never been altogether certain that I was right to have agreed to continue to teach Property after it was reduced from six credits to four.

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Professor Wilkins was a central pillar of the law school's institutional existence. He was one of the most reliable and essential contributors to faculty governance—willing to chair and serve on demanding committees and always a dependable participant in meetings and discussions. His characteristic closing for messages regarding faculty disagreements was "Respectfully"—no matter the topic, no matter how much heat might be generated among the disputants, Professor Wilkins's contributions always were useful, thoughtful, pertinent, and civilly and "respectfully" proposed.

Professor Wilkins often quoted Justice Cardozo. I should like to do so as well. Justice Cardozo wrote that "The victory is not for the partisans of an inflexible logic nor yet for the levelers of all rule and all precedent, but the victory is for those who shall know how to fuse these two tendencies together in adaptation to an end as yet imperfectly discerned."[1] That Professor Lawrence B. Wilkins made profound contributions to enabling new generations of lawyers to secure this victory is what I wish to submit—most grateful and respectfully.

1. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 143 (1924).

LEGACY: PROFESSOR LAWRENCE P. WILKINS

WILLIAM J. WOODWARD, JR.*

In 1980, I arrived at Indiana University School of Law—Indianapolis to start work as a brand-new Assistant Professor. I was assigned to an office adjacent to that of another newcomer, one Professor Lawrence P. Wilkins, and our offices were linked by a doorway for the time I remained on the faculty. Even then, the person I encountered in the next room had some gray hair. And he seemed extremely gruff and a little scary at first. He remained after I left and has now retired. What did he leave behind?

It's a rarity these days to find *anyone* staying on any one job for more than a few years. What then do we make of someone who defies itinerant stereotypes and stays for close to 30 years? In a song written in his later years, musician Neil Young nostalgically wrote about having left "our tracks in the sound."[1] What "tracks" might a professional educator leave apart from their published work?

Deans, of course, leave in their wake classrooms, libraries, buildings, or portraits. But professors who resist the mysterious draw of administration leave few physical traces of their time on the job. Their legacy, rather, resides in the way their former institution now functions and, of course, in the minds and thinking of those whom they have influenced through their teaching and writing.

So, the dean appoints a newly-hired professor to some committee and in the course of that committee's work, the professor has a good idea. It could be a new admissions policy, an idea for creating a new student organization, or a curricular change. Of the hundreds of such ideas an engaged Professor X might have had in three decades of institutional service, some will have been implemented and some of those may show up in some recognizable form today while others may have more subtly contributed to the feel or very trajectory of the institution itself. So, for example, the professor may have arrived with a bee in his bonnet about putting more simulation work into the curriculum. Persistent noise in committee and faculty meetings and leadership by example may have slowly, almost imperceptibly, transformed the institution into one where simulation instruction has become the norm rather than the exception.

An active, engaged professor might affect an institution in far more subtle ways. Many know or have heard of institutions where conflicts within the faculty threaten to paralyze the institution and others that are models of harmonious, consensus decision making. While some institutions seem condemned to faculty dysfunction in perpetuity, they don't just get that way. Nor are harmonious institutions the beneficiaries of dumb luck. Strong, persistent personalities can, over time have a positive—or negative—influence on how colleagues relate to one another (and the dean), both inside and outside of formal meetings. Strong deans can, of course, influence these dynamics, but they are seldom in it for the long haul and the "personality" of a law faculty can only be altered over the long run.

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* Professor of Law, Temple University. Thanks to Molly Woodward for her editorial suggestions.

1. NEIL YOUNG, *Painter*, *on* PRAIRIE WIND (Reprise Records 2005).

The professor exerts this kind of influence almost unconsciously, not specifically *intending* to change things, just doing the job. The influence comes from the gravitational force the personality has on people around them. The influence is felt indirectly inasmuch as it is slow and evolutionary, only perceived when taking the long view backwards.

Students, by contrast, are the targets of direct, even calculated influence. However, opportunities to influence students are far more fleeting and diluted. Here a professor of thirty or so years has the numbers in his favor. Simple odds suggest that we would find some tracks in the lives of the thousands of students a professor has encountered over a career of many years, particularly if that professor regularly encountered entering, first-year law students. Tangible tracks might be surprisingly trivial—showing up in a former student's routine use of an unconventional term ("she's got a *Palsgraf* problem"), a particular diagram to help in mapping a given kind of problem (a time line), or some abbreviation ("K" for contract). Educators might hope the tracks would be more meaningful (a highly-developed sense of "proximate cause") but substantive tracks are harder to claim and probably more subtle—more likely found in something like the similarity between a long-forgotten torts class and the way a lawyer of twenty years approaches a given torts problem. Such tracks may be buried but are foundational nonetheless.

When it comes to influence on colleagues, the dynamic is somewhere between inadvertent influence that occurs imperceptibly over the long haul and direct, pointed influence designed for and directed at students. It depends on such random factors as legal specialty, age, and even office location.

I was hired almost thirty years ago to teach contracts and commercial courses at Indiana University School of Law—Indianapolis and left four years later as an Associate Professor headed to the East Coast. My good fortune was for that brief period to have occupied that office adjacent to the gruff, graying Associate Professor Wilkins, a lateral hire from Akron Ohio, three or four years my senior. For a new professor, the first years are formative, those in which one learns to teach, learns appropriate behavior towards one's institution, colleagues, and students, and begins to develop a professional identity very different from that of a lawyer. I spent four years in that adjacent office with the door to his office open nearly all the time. One could scarcely wish for a better office assignment inasmuch as Professor Wilkins (whom I'll now refer to as Larrie) taught me much of what I know about being a law professor. He was, easily, the strongest influence in my own early development as an academic, and I see evidence of the tracks he's left with me nearly every day.

Most of what I learned from Larrie has to do generally with the level of professionalism we ought to expect from those fortunate enough to be trusted with an academic appointment. Larrie taught me about academic professionalism largely through his example as a teacher and institutional good citizen. Some came directly as instruction, usually solicited. Far more came indirectly, from the gravitational force of his personality and the values embedded in it.

Teaching was at the center of Larrie's professional work. While he used to caution me that teaching was a "black hole" into which one could pour endless energy to the detriment of a professor's other obligations, he put as much creative

energy into the teaching enterprise as any experienced teacher I have ever known. He was one of the first people I know of to use the labor-intensive device of dividing large classes into "law firms" and using that construct to teach his students substance, skills, and professionalism in the process. He was constantly developing new exercises for his classes, constantly trying new ideas, constantly changing. He introduced me to the concept of the "exam feedback memo," a device that takes the final exam—typically an evaluative device—and turns it into a learning device. My own exams have ever since been followed by exam feedback memos and, I'm sure he'd be happy to learn, at least a handful of my own colleagues have followed the example I acquired from him. Larrie also developed materials to teach students about taking exams, materials I continue to use to this day. He had great curiosity about the process of learning and, leading by example, prompted me to attend sessions outside the law school dealing with broader issues of teaching.

Larrie also served as a role model for me on the general question of how a law professor relates to the institution—how much energy one can appropriately devote to institutional service, what range of creativity is acceptable, how one relates to one's colleagues on committees, how much one should care about institutional decisions. I recall him always being in the thick of institutional issues—wholesale curricular reform was the first of them. Yet while his engagement was unequivocal while the issue of the day was in play, it was also measured—he knew when to give up on a lost cause. I made very few moves in my own institutional work at Indiana without consulting him and he was always a source of wisdom and good guidance.

Perhaps the most important instruction Larrie gave me by example was about professionalism and integrity more generally. He was always scrupulously honest and straight, sometimes to a fault perhaps. He said what he thought to Dean and colleagues alike, even when his views were unpopular or difficult to accommodate. He would never consider reducing his classroom demands on students to gain popularity and was regarded by students as a very demanding teacher. He was unbelievably careful about grading exams and papers. He was always a workhorse on committees and a very effective leader when he was chair. In short, he simply never slacked off, always gave everything he had to the job before him.

While I know they're there, it is anybody's guess what less-tangible tracks Larrie left with me—buried and mixed as they are with over twenty-five years of work 700 miles away from that adjacent office. Nor can I guess at what tracks Larrie left with other, longer-term colleagues, with his institution of nearly thirty years, or with his thousands of students. I do know that we're all the better for his influence, whatever it was.

I can't contribute a library, a portrait, or even a book to honor his legacy. But while he may not have invented them (I don't know who did), Larrie was the ancestral source of *my* exam feedback memos, nearly thirty years worth of them distributed to thousands of *my* students. It thus seems appropriate, in the case of such a consummate educator, to acknowledge his contribution to *my* students. So, I've dedicated my latest one that I've distributed to my students, for an exam just concluded in Contracts, as *The Lawrence P. Wilkins Memorial Exam*

Feedback Memo. This may be an eccentric or even a corny move, but in our age of the impermanent present, there seems something useful in reminding ourselves (and my own students) that ideas have a history, and a longevity that survives particular individuals.

Larrie's many contributions are a legacy about which many have been, and will continue to be grateful.

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ARTICLES

PHYSICIANS AND PATIENTS WHO "FRIEND" OR "TWEET": CONSTRUCTING A LEGAL FRAMEWORK FOR SOCIAL NETWORKING IN A HIGHLY REGULATED DOMAIN

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"If Relationship George walks through this door, he will kill Independent George! A George divided against itself cannot stand!"[1]

INTRODUCTION

Computer-mediated social network sites are omnipresent and among the most popular of all web destinations. There seem to be few limits on who is posting or the subject matter of posts, and there is scant guidance on the appropriate limits for online social interactions. Originally, such sites were the exclusive playground of teenagers and college students (who continue to be the majority of users).[2] Not surprisingly given this original demographic, media and legal scrutiny concentrated on the potential of such sites to enable child predators,[3] facilitate other abuses of children and young adults such as bullying,[4] and encourage graffiti behavior in adolescent users.[5]

Although teenagers and young adults remain the dominant groups using social network sites, adult usage quadrupled between 2005 and 2008[6] as adults migrated to Facebook and MySpace initially, perhaps, to connect with their children and grandchildren.[7] By December 2008, 35% of online adults had used a social network site.[8] Of course, all users do not equally enjoy all social network activities. For example, updating one's personal status using Twitter or Facebook's "What's on your mind?" feature continues to be an activity

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1. *Seinfeld: The Pool Guy* (NBC television broadcast Nov. 16, 1995).

2. Amanda Lenhart, ADULTS AND SOCIAL NETWORK WEBSITES, PEW INTERNET & AMERICAN LIFE PROJECT (2009), http://www.pewinternet.org/~/media//Files/Reports/2009/PIP_Adult_Social_networking_data_memo_FINAL.pdf.pdf.

3. *See, e.g.*, Doe v. MySpace Inc., 528 F.3d 413 (5th Cir.), *cert. denied*, 129 S. Ct. 600 (2008).

4. *See, e.g.*, United States v. Drew, No. CR 08-0582-GW, 2009 WL 2872855 (C.D. Cal. Aug. 28, 2009); Lauren Collins, *Friend Game: Behind the Online Hoax That Led to a Girl's Suicide*, NEW YORKER, Jan. 21, 2008, *available at* http://www.newyorker.com/reporting/2008/01/21/080121fa_fact_collins; Alexandra Zavis, *MySpace Conviction in Doubt*, L.A. TIMES, July 3, 2009, at A3, *available at* 2009 WLNR 12700576.

5. *See infra* notes 136-49 and accompanying text (cases involving, for example, schoolchildren posting abusive materials about their schools or teachers).

6. Lenhart, *supra* note 2, at 1.

7. John D. Sutter, *All in the Facebook Family: Older Generations Join Social Networks*, CNN.COM, Apr. 13, 2009, http://www.cnn.com/2009/TECH/04/13/social.network.older/.

8. Lenhart, *supra* note 2, at 1; *see also* Sutter, *supra* note 7.

dominated by young adults.[9]

Online social networks are increasingly attracting the attention of large and small businesses and professionals as vehicles for advertising, marketing, and providing customer support.[10] For example, 54% of attorneys belong to an online social network,[11] although membership remains skewed towards younger professional users.[12] As the demographics of and motivations behind participation in social networks evolve, the foundational teenager versus teenager relationships and inevitable disputes will be replaced by more complex relationships and risks that are considerably more nuanced.

This Article focuses on one highly complex relationship, that of physician and patient. That relationship, together with the related imperative of protecting patient information, constitutes a crucial component of the legal domain applicable to our most highly regulated industry. Recent inquiries into the trust and confidence properties of the physician-patient relationship and the protection of patient data concentrated on the technical (diagnostic, pharmacy, etc.) data associated with the care relationship. Thus, questions have been asked about the adequacy of protection for networked or interoperable electronic records.[13] Such inquires have escalated as patients have been encouraged to leverage technology to store their own "personal" health records.[14] This Article is less interested in technical medical data and more with *social* data that implicates health and

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9. AMANDA LENHART & SUSANNAH FOX, TWITTER AND STATUS UPDATING, PEW INTERNET & AMERICAN LIFE PROJECT 1 (2009), *available at* http://www.pewinternet.org/~/media//Files/Reports/2009/PIP%20Twitter% 20Memo%20FINAL.pdf.

10. *See, e.g.*, Posting of Douglas A. McIntyre to 24/7 WallSt.com, http://247wallst.com/2009/05/26/the-ten-ways-twitter-will-permanently-change-american-business (May 26, 2009, 20:11 EST); *see also* Nicola Clark, *Airlines Follow Passengers Onto Social Media Sites*, N.Y. TIMES, July 29, 2009, http://www.nytimes.com/2009/07/30/business/global/30tweetair. html; Amy Miller, *FMC Turns to Social Networking to Find Law Firms*, LAW.COM, May 18, 2009, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202430756051 (discussing use by client to increase its pool of potential outside counsel through post on *Legal OnRamp*, a social network for lawyers); Richard Raysman & Peter Brown, *Behavioral Ads: Social Networks' Latest Legal Pitfall?*, LAW.COM, Mar. 25, 2008, http://www.law.com/jsp/lawtechnologynews/pubArticleLT.jsp? id=900005506762; Jason Snell, *Nine Twitter Tips for Business: How to Strike the Right Balance When Using This Popular Messaging Service*, MACWORLD, May 4, 2009, http://www.macworld.com/article/140254/2009/05/twitterdos.html.

11. *Survey Reveals Growth in Online Professional Networking Among Legal Professionals, Appetite for Lawyer-Specific Networking Solutions*, July 10, 2008, http://www.businesswire.com/news/home/20080710005598/en.

12. *Id.* (reporting membership of 25-35 (67%), 36-45 (49%), and 46-55+ year olds (36%)).

13. *See* Nicolas P. Terry & Leslie P. Francis, *Ensuring the Privacy and Confidentiality of Electronic Health Records*, 2007 U. ILL. L. REV. 681, 691-96; *see also* Leslie P. Francis, *The Physician-Patient Relationship and a National Health Information Network*, J.L. MED. & ETHICS (forthcoming).

14. *See generally* Nicolas P. Terry, *Personal Health Records: Directing More Costs and Risks to Consumers?*, 1 DREXEL L. REV. 216 (2009).

health-related decision-making. Here, the inquiry is how our legal, ethical, and regulatory models will react as the social network phenomenon overlaps with traditional healthcare relationships and businesses.

The analysis draws on the limited extant law dealing specifically with social network interactions and the law and ethics literature dealing with existing computer-mediated interactions between physicians and patients. The legal analysis principally is concerned with privacy and confidentiality constructs, described below as the "Law of Boundaries." The Article explores how participation in online social networks may blur boundaries between personal and professional relationships or commentary, while making available "private" information in what only appears to be a secluded area. The Article also examines the potential for amelioration of risks with the currently under-utilized privacy and security settings provided by the online social networks.

The Law of Boundaries is applied to some specific scenarios where category breakdown may be detected: (1) physician social information online, (2) patient health-related information online, (3) physicians and patients as "friends," and (4) physicians "tweeting" or posting about their work. These online scenarios challenge the perceptions, expectations, and sense of trust that are the properties of the offline physician-patient relationship. The application of legal, ethical, and regulatory models to these "worlds collide" phenomena casts doubts on the appropriateness of some professional activities and the online social activities of some physicians. Additionally, the Article identifies the considerable risks run by online patients who post about or otherwise signal their health status. Among several conclusions applicable to these social network scenarios it is suggested that the Law of Boundaries must evolve to protect non-public data or secluded areas established by users of social network sites.

I. SOCIAL NETWORKS

The most popular social network sites include Facebook, MySpace, Twitter, and LinkedIn.[15] Facebook has in excess of 250 million registered users[16] and its subscribers spend more than three billion minutes per day on the web site.[17] Of these services Facebook[18] and Twitter[19] currently show the largest growth.

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15. Posting of Andy Kazeniac to Compete.com, http://blog.compete.com/2009/02/09/facebook-MySpace-twitter-social-network/ (Feb. 9, 2009).

16. Erick Schonfeld, *Facebook Is Now the Fourth Largest Site in the World*, TECHCRUNCH, Aug. 4, 2009, http://www.techcrunch.com/2009/08/04/facebook-is-now-the-fourth-largest-site-in-the-world (reporting 340 million unique visitors).

17. Owen Thomas, *Facebook at 5: What the Future Holds*, Feb. 4 2009, http://valleywag.gawker.com/5145975/facebook-at-5-what-the-future-holds.

18. *See* Schonfeld, *supra* note 16.

19. Kelly Gregor, *Twitter Takes Top Growth Spot*, NAT'L BUS. REV. 24/7, Jan. 27, 2010, http://www.nbr.co.nz/article/twitter-takes-top-growth-spot-117639. *Compare* Top 10 Social-Networking Websites & Forums—February 2009, http://www.marketingcharts.com/ interactive/top-10-social-networking-websites-forums-february-2009-8286/ (showing that Twitter was not a top

Eleven percent of online American adults use Twitter or features on social network service sites to share information or read "updates" from others.[20] The use of social network sites is now so pervasive that we may well be on our way to what Anita Allen described as "the technological conceit of twenty-first century 'lifelogging.'"[21]

Our contemporary concept of social networking is a subset of computer-mediated (or computer network-mediated) communication. This latter, broader term includes email, blogs, web sites, and instant messaging.[22] These extant models of computer network-mediated communication will inform the discussion that follows. However, they lack the distinctive features of social network services.

A. Properties of Social Networks

According to one court, "[o]nline social networking is the practice of using a Web site or other interactive computer service to expand one's business or social network."[23] Boyd and Ellison provide a granular definition: "[W]eb-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system."[24]

There are two broad categories of computer-mediated social networks. First, there are those, like LinkedIn,[25] that emphasize professional or business

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ten social networking site in Feb. 2009), *and* Marketing Charts, Top 10 Social-Networking Websites & Forums—March 2009, http://www.marketingcharts.com/interactI've/top-10-social-networking-websites-forums-february-2009-2-8749/ (showing that by March 2009 Twitter was the eighth most popular social networking site), *with* Marketing Charts, Top 10 Social-Networking Websites & Forums—October 2009, http://www.marketingcharts.com/interactive/top-10-social-networking-websites-forums-october-2009-11099/ (showing that Twitter was the sixth most popular social networking site in October 2009).

20. LENHART & FOX, *supra* note 9, at 1.

21. Anita L. Allen, *Dredging up the Past: Lifelogging, Memory, and Surveillance*, 75 U. CHI L. REV. 47, 48 (2008).

22. A more expansive list of social network services or sites could be drawn up. For example, for some the fact that viewers rate content on YouTube, share opinions about products on Amazon.com, or rate each other on Ebay.com might qualify these sites as social networks.

23. Doe v. MySpace Inc., 528 F.3d 413, 415 (5th Cir.), *cert. denied*, 129 S. Ct. 600 (2008); *see also* Liveuniverse, Inc. v. MySpace, Inc., No. CV 06-6994 AHM CRZx, 2007 WL 6865852 (RZx), at *1 (C.D. Cal. June 4, 2007) ("Social networking websites allow visitors to create personal profiles containing text, graphics, and videos, as well as to view profiles of their friends and other users with similar interests."), *aff'd*, 304 F. App'x 554 (9th Cir. 2008).

24. danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMMC'N, at art. 11 (2007), http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html.

25. *See About Us*, http://press.linkedin.com/about (last visited Feb. 8, 2010) ("LinkedIn is

networking. Second, there are those, such as Bebo[26] (a site popular in Europe[27]), MySpace,[28] and Facebook,[29] which leverage the social or friendship properties of pre-existing, predominately offline networks of intimates, friends, and acquaintances.

Boyd and Ellison explain this distinction between networking and networks as follows:

> What makes social network sites unique is not that they allow individuals to meet strangers, but rather that they enable users to articulate and make visible their social networks. . . . [P]articipants are not necessarily "networking" or looking to meet new people; instead, they are primarily communicating with people who are already a part of their extended social network.[30]

Thus, a typical LinkedIn subscriber seeks to leverage the contacts of contacts to increase the range of their professional networking. But a Facebook user primarily seeks to communicate with an existing network of friends. These users only incidentally (or at least initially), leverage the virtual networks of his or her friends to identify and then "friend" participating friends from their existing real world network.[31] Empirical data seems to bear out this distinction. Adults use professional sites sparingly (e.g., 6% of adults use LinkedIn), but they use them almost exclusively for professional purposes. Social network sites such as Facebook and MySpace see more mixed use, but adults tend to use them far more

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an interconnected network of experienced professionals from around the world, representing 150 industries and 200 countries. You can find, be introduced to, and collaborate with qualified professionals that you need to work with to accomplish your goals.").

26. *See* bebo.com, About Bebo, http://www.bebo.com/c/about (last visited Feb. 8, 2010) ("Bebo is a popular social networking site which connects you to everyone and everything you care about. It is your life online—a social experience that helps you discover what's going on with your world and helps the world discover what's going on with you.").

27. *See* Geoff Duncan, *Bebo Launches Five European Localizations*, DIGITAL TRENDS, Mar. 16, 2009, http://digitaltrends.com/international/bebo-launches-five-european-localizations.

28. *See* MySpace Quick Tour, http://www.MySpace.com/index.cfm?fuseaction=userTour.home (last visited Oct. 9, 2009) ("MySpace is a place for friends; MySpace is Your Space; MySpace keeps you connected.").

29. *See* Facebook, http://www.facebook.com/ (last visited Oct. 9, 2009) ("Facebook helps you connect and share with the people in your life.").

30. boyd & Ellison, *supra* note 24.

31. One report notes:

> Facebook members seem to be using Facebook as a surveillance tool for maintaining previous relationships, and as a "social search" tool by which they investigate people they've met offline. There seems to be little "social browsing," or searching for users online initially with the intention of moving that relationship offline.

Cliff Lampe et al., *A Face(book) in the Crowd: Social Searching vs. Social Browsing*, PROC. OF THE 2006 20TH ANNIVERSARY CONF. ON COMPUTER SUPPORTED COOPERATIVE WORK (2006), http://portal.acm.org/citation.cfm?id=1180901.

for social purposes.[32]

The reason for drawing this admittedly imprecise distinction between the two types of service is that these uses or functions will tend to drive differential expectations of privacy, confidentiality, and appropriateness of communications. It is assumed, for example, that those who participate in true professional networking services tend to be more guarded and finite in their engagements. In contrast, those who post or share "what's on [their] mind" on Facebook generally do so with the expectation that they are communicating with a group of friends, an extant social group. Although social networking and social network services function quite similarly, this Article concentrates on the latter group. As such, it ignores social network sites designed solely for healthcare professionals[33] or those that cater to specific diseases or illnesses.[34]

A user of a social network site registers with the service and then creates a profile. This profile functions as the link between the user's real world and virtual world personas. This profile may include a variety of rich media including photographs, videos, and links. Typically, the service will have some kind of search engine that will discover existing real world friends who have a virtual presence in the social network. Usually, a user can opt-out from being so discoverable. Once a user identifies someone with whom they wish to virtually network, they send (e.g., on Facebook) a "friend" request. The network loop is not established until the putative friend accepts that request.[35]

Twitter[36] is similar to the character-limited news feed ("What's on your mind?") popularized by Facebook. But it differs from other social networks because its users are less likely to restrict the viewing of their posts to a restricted group of existing contacts, although that is possible.[37] Users of Twitter "tweet" in bites of up to 140 characters what they are doing or thinking at any particular time. Other Twitter subscribers may then follow these postings. Thus, those who are interesting because they are famous, or famous because they are interesting, have their posts followed by other subscribers, frequently in far larger numbers than Facebook friends. Thus, Twitter shares characteristics with web (particularly blog) sites in that it tends to operate as a broadcast or one-to-many service. As predominantly used, Twitter lacks a key property of other popular social networks in that the publisher of a message typically will not control who

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32. Lenhart, *supra* note 2, at 6.

33. *See, e.g.*, Sermo, http://www.sermo.com/ (last visited Oct. 10, 2009).

34. *See, e.g.*, PatientsLikeMe, http://www.patientslikeme.com (last visited Oct. 10, 2009); *see* Jeana H. Frost & Michael P. Massagli, *Social Uses of Personal Health Information Within PatientsLikeMe, an Online Patient Community: What Can Happen When Patients Have Access to One Another's Data*, 10 J. MED. INTERNET RES., at e15 (2008), http://www.jmir.org/2008/3/e15/.

35. *See generally* boyd & Ellison, *supra* note 24 (describing social networking sites' procedures for participation).

36. *See* About Twitter, http://twitter.com/about ("Twitter is a real-time information network powered by people all around the world that lets you share and discover what's happening now.").

37. Just as it is possible, but less likely, that a user will open his or her Facebook page to the public.

can see that post (i.e., it is one-directional rather than bi-directional[38]); although it does resemble a service such as Facebook, in that the consumer can choose whether or not to subscribe to posts from that other user.[39]

B. Use, Perceptions, and Expectations

Basic Internet communication tools are either limited in their reach or obvious as to their broadcast nature. Notwithstanding the occasional breakdown when a user ill advisedly clicks "reply to all" or "reply" on a listserv, email is, and is perceived to be, a one-to-one communication. In practice, email may be no more private than sending a postcard through the mail because it could potentially be read by many, but few postcards are read by unintended recipients. At the other extreme, the publisher of content to a web page or a traditional blog should realize that this is a one-to-many broadcast.

In the much-discussed world of Web 2.0, where the creation or sharing of content by users rather than traditional content publishers is emphasized,[40] online search, communication, and networking tools allow those online to apply a virtual overlay to their offline lives. Thus, a user who enters an address into Google Maps creates a representation of that real place. When that user enables location services on a mobile device[41] and allows the online service to share that data with others, the user's real and virtual world locations are overlaid. Similarly, when a user converses on a social network service he or she is mapping his or her virtual conversation to his or her real network of friends and acquaintances. Facebook refers to this as "the digital mapping of people's real-world social connections."[42] However, the potential consequences of such virtual communication are of a different order.

Real world, or offline, communications are beset by inefficiencies and noise

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38. *See* boyd & Ellison, *supra* note 24.

39. The terrain is further complicated by interactions between these services. For example, Twitter users can link their "tweets" to Facebook so that they are displayed in Facebook as news feeds. *See* Tweeter, Tweeter Is on Facebook, http://www.facebook.com/apps/application.php?id=16268963069 (last visited July 10, 2009).

40. *See* Jessi Hempel, *Web 2.0 Is So Over. Welcome to Web 3.0*, FORTUNE, Jan. 8, 2009, http://money.cnn.com/2009/01/07/technology/hempel_threepointo.fortune/index.htm; *see also* Gunther Eysenbach, *Medicine 2.0: Social Networking, Collaboration, Participation, Apomediation, and Openness*, 10 J. MED. INTERNET RES., at e22 (2008), http://www.jmir.org/2008/3/e22; Benjamin Hughes et al., *Health 2.0 and Medicine 2.0: Tensions and Controversies in the Field*, 10 J. MED. INTERNET RES., at e23 (2008), http://www.jmir.org/2008/3/e23/; Rick McLean et al., *The Effect of Web 2.0 on the Future of Medical Practice and Education: Darwikinian Evolution or Folksonomic Revolution?*, 187 MED J. AUSTL. 174, 174 (2007); Tim O'Reilly, *What Is Web 2.0? Design Patterns and Business Models for the Next Generation of Software*, O'REILLY, Sept. 30, 2005, http://www.oreilly.de/artikel/web20.html.

41. *See, e.g.*, Apple, Phone and iPod Touch: Understanding Location Services, http://support.apple.com/kb/HT1975 (last visited Feb. 8, 2010).

42. Facebook, Press Room, http://www.facebook.com/press.php (last visited Oct. 10, 2009).

that have the effect of limiting the reach of the participants' communications. The context of the listening group[43] will, or should, modulate the content of the conversation. Social network services break this paradigm because they encourage and operationalize the posting of intimate or private moments or thoughts on the user's news feed, wall, or in a tweet. Services such as Facebook confuse the communication model for the user and potentially lead to category breakdown because they offer the opportunity for apparently one-to-one conversations[44] that are nevertheless open to all in a group (a broadcast context).

This initial category breakdown—or state of pseudo-seclusion—is exacerbated in online social networks because the smaller, inefficient, and segregated social categories we tend to have in the real world (relatively distinct categories of intimates, co-employees, co-professionals, etc.) may become blurred when we create larger aggregated friend groups from several categories. For example, a Facebook user's network of friends likely will start with a small number of intimates. As the social network service's tools for finding friends are used,[45] the properties of the friended group may have changed dramatically to include co-workers, employers, or customers.

It may be the case that users of social network sites are "quite oblivious, unconcerned, or just pragmatic about their personal privacy."[46] Equally, such users may be willing to trade their private information knowingly, usually only shared with intimates, in order to increase their number of friends and build new online or offline relationships.[47] In their study of information sharing on Facebook, Gross and Acquisti examined the tenuous application of social network theory[48] to online networks. As they observed, although offline social networks may consist of extremely diverse relationships from intimates to acquaintances, online networks can "reduce these nuanced connections to simplistic binary relations: 'Friend or not.'"[49] Although the context changes as

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43. For example, an audience of intimates or co-workers around the water-cooler would be a listening group.

44. An example of this would be a wall comment.

45. Examples of friend finding tools include Facebook's ability to allow users to data mine one's Gmail address book or "friending" mere acquaintances who are friends of friends.

46. Ralph Gross & Alessandro Acquisti, *Information Revelation and Privacy in Online Social Networks (The Facebook Case)*, (ACM) WORKSHOP IN PRIVACY IN ELECTRONIC SOC'Y 71, § 4 (2005).

47. *See, e.g.*, Catherine Dwyer et al., *Trust and Privacy Concern Within Social Networking Sites: A Comparison of Facebook and MySpace*, AMS. CONF. ON INFO. SYSTEMS 2007 PROC., Paper 339, http://aisel.aisnet.org/amcis2007/339.

48. This sociological construct identifies the properties of social relationships as "nodes" and "ties" and the relative strengths (e.g., weak or strong) of the latter. *See Social Network*, *in* WIKIPEDIA, http://en.wikipedia.org/wiki/Social_network.

49. Gross & Acquisti, *supra* note 46, § 2.1 (quoting d. boyd, *Friendster and Publicly Articulated Social Networking*, *in* 2004 CONF. ON HUM. FACTORS & COMPUTING SYS.) As discussed below, Facebook now permits disaggregation of "friends" into multiple categories that can then be set with different permissions. However, there is no indication yet as to how many

the user moves from offline to online discourse and data sharing, the user may not be fully aware of the category blurring and fail to appropriately modulate the content.

Social network services also impact how users interact with their posted data or content due to a shift from taxonomy, top-down indexing by experts or content owners, to folksonomy (bottom-up indexing or "social tagging" by users).[50] Consider the participant in our water cooler conversation who shows a recent photograph to the other participants. Our participant likely will contextualize the image (e.g., "last weekend-a quiet celebration with friends"). This taxonomy (or metadata) will exclusively index that image for the other participants. Now, consider the same image uploaded to the participant's social network site. Because the site allows tagging of content by other users, folksonomy, the content owner loses exclusive control of the indexing of the image. Now, a "friend" may tag (add metadata to) the image (say, by adding information as to the identity of other participants) or comment on it. Thus, an image that was benign in the water-cooler setting may be re-indexed by other users (e.g., "drunk at medical school reunion;" or "so, that's why you missed work"). As follows from the discussion above, this re-indexing occurs in a context that allows broadcast to a much larger group consisting of multiple offline but aggregated online social categories.

C. Social Network Privacy and Security Settings

Most social network services provide tools for making data or communications less public. Facebook allows users to choose which information to include in their profiles and limit which users can see that information.[51] MySpace and Twitter similarly allow users to control who can see their profile information.[52] Appropriately risk-averse users may also choose to opt out of the popular social network sites and only post on networks restricted to other licensed physicians.[53] Indeed, users with multiple profiles tend to create them on different sites. Of social network site users who have multiple profiles, 25% do so in order to disaggregate their followers, for example by keeping professional

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users opt to use this feature.

50. *See, e.g.*, Daniel H. Pink, *Folksonomy*, N.Y. TIMES MAG., Dec. 11, 2005, at 69, *available at* http://www.nytimes.com/2005/12/11/magazine/11ideas1-21.html?_r=z; J. Trant, *Studying Social Tagging and Folksonomy: A Review and Framework*, 10 J. DIGITAL INF. (2009); *see also* McLean et al., *supra* note 40, at 175.

51. Facebook, Facebook's Privacy Policy, http://www.facebook.com/policy.php (last visited Dec. 28, 2009).

52. *See* MySpace, About Settings, http://www.myspace.com/Modules/ContentManagement/Pages/page.aspx?placement=privacy_settings, (last visited Oct. 10, 2009); Welcome to Twitter Support!, http://help.twitter.com/portal (last visited Oct. 10, 2009).

53. *See, e.g.*, Sermo, http://www.sermo.com (last visited Dec. 28, 2009). "Sermo uses a proprietary technology to verify physicians' credentials in real-time." Get to Know Sermo, http://www.sermo.com/about/introduction (last visited Feb. 8, 2010).

relationships on one site and personal ones on another.[54]

Popular social network sites offer an array of privacy and security strategies. For example, by using included private modes of communication, users can initiate secure communication without adjusting privacy settings at all. Thus, Facebook, MySpace, and Twitter allow for private messages to be exchanged directly between users,[55] limiting more sensitive conversations to a specific recipient. Similarly, Facebook allows users to exchange real-time instant messages that can only be viewed temporarily,[56] lessening concerns about communication records being used later in a negative manner.

Recently distinguishing itself from competitors, Facebook now permits disaggregation of "friends" into multiple categories that can then be set with different permissions.[57] Utilizing this feature should allow a user to enjoy more relaxed security settings with intimates while benefiting from tightened privacy control for professional contacts.[58] Simply educating users about these settings can radically reduce exposure of private or semi-private information. For example, the authors of the Florida medical student and resident survey discussed below[59] reported that, "telling students to increase their privacy settings on Facebook yielded an 80% reduction in publicly visible accounts."[60]

However, such risk management strategies are seriously under-utilized because so few users change the "open" default privacy and security settings on social network sites.[61] A study conducted by MIT students found that over 70% of the Facebook profiles examined were open to the public.[62] This is an alarming number when considering that a Pew study found that "47% of internet users

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54. Lenhart, *supra* note 2, at 8.

55. Facebook Help Center: Messages and Inbox, http://www.facebook.com/help/?page=real-time406#!/help.php?page=938 (last visited Feb. 8, 2010); *see also* MySpace, Can You Send Messages to Several Friends at a Time?, http://faq.myspace.com/app/answers/detail/a_id/262/kw/myspace%20mail/c/%20/r_id/ 100061, (last visited Oct. 11, 2009); Twitter Support, http://help.twitter.com/portal, (last visited Oct. 11, 2009).

56. Facebook Help Center: Chat: How to Use the Chat Feature, http://www.facebook.com/help.php?page=824 (follow "How do I delete or look through my chat history? Is it saved permanently?" hyperlink), (last visited Oct. 11, 2009) ("You cannot view older conversations or conversations with friends who are not currently online.").

57. *See also* Posting of Alison Driscoll to Mashable: The Social Media Guide, http://mashable.com/2009/04/28/facebook-privacy-settings/ (Apr. 28, 2009).

58. *See generally* Posting of Marshall Kirkpatrick to ReadWriteWeb, http://www.readwriteweb.com/archives/a_closer_look_at_facebooks_new_privacy_options.php (June 29, 2009, 12:37).

59. *See infra* text accompanying note 267.

60. L.A. Thompson et al., *Author Reply*, J. GEN. INTERNAL MED. 2156, 2156 (2008) (citation omitted).

61. *Compare* Gross & Acquisti, *supra* note 46, § 5, *with* Lenhart, *supra* note 2, at 9 (reporting sixty percent of adult users restrict access to their profiles to friends).

62. Harvey Jones & José Hiram Soltren, *Facebook: Threats to Privacy* 13 (2005), http://groups.csail.mit.edu/mac/classes/6.805/student-papers/fall05-papers/facebook.pdf.

look online for information about doctors."[63] Further, the MIT study was conducted by using software to automatically examine the information available in user profiles.[64] Even temporarily unsecured profiles have the potential of being subject to mass data collection, putting users at risk of having their information permanently stored by third-party data aggregators.[65]

Even proper and consistent use of privacy or security settings has some limitations. Needless to say, such privacy and security settings may, as with any other type of online data storage, be defeated by hackers.[66] However, social network sites are not subject to the same comprehensive security requirements as HIPAA mandates for healthcare entities.[67] More importantly, data that is de-identified or rendered pseudonymous may be re-identified if the user has the same profile picture or other demographic data both on one secure and another insecure profile.[68] Users may also defeat the purpose of privacy controls by exercising poor judgment in choosing whom to "friend."[69] For example, a user could have a secured profile but post a comment on another user's public profile that anyone can see.

Ultimately the solution to many but not all of the issues discussed in this article will themselves be technological. Larry Lessig's view of code, or system, architecture holds true here, and suggests that features of the architecture of social network sites will "constrain some behavior by making other behavior possible, or impossible."[70] Changes in the privacy and security settings of Facebook and other social networking sites will likely be the most efficient "regulation" of these issues, certainly more efficient than case-by-case application of the law of boundaries. As the potential for employment or the availability of health insurance are publicly seen as dependent on more responsible online behavior, so the demand for better architecture will increase, as will its utilization, and the spiral will continue until only outlying scenarios

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63. Susannah Fox & Sydney Jones, *The Social Life of Health Information*, PEW INTERNET & AMERICAN LIFE PROJECT 35 (2009), http://www.pewinternet.org/~/media//Files/Reports/2009/PIP_ Health_2009.pdf.

64. Jones & Soltren, *supra* note 62, at 11.

65. *Id.*

66. *See, e.g.*, Claire Cain Miller & Brad Stone, *Twitter Hack Raises Flags on Security*, N.Y. TIMES, July 15, 2009, http://www.nytimes.com/2009/07/16/technology/internet/16twitter.html?ref=technology; Posting of Chris Dannen to Fast Company.com, http://www.fastcompany.com/blog/chris-dannen/techwatch/10-questions-answered-facebook-attacks (May 15, 2009 12:30). Hacking of social network sites (or even government surveillance of same) is outside the terms of reference of this article. In such cases statutory protections involving criminal and civil liability may apply, for example, under the Electronic Communications Privacy Act of 1986. *See* 18 U.S.C. §§ 2510-2522 (2006).

67. *See* 45 C.F.R. §§ 160, 162, 164 (2009).

68. Gross & Acquisti, *supra* note 46, § 4.2.

69. *See* Jones & Soltren, *supra* note 62, at 20 (explaining that their study found 28.7% of Facebook users "friend strangers on occasion").

70. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 89 (1999).

remain.

In parallel to architectural evolution facilitated by code innovation and prompted by market pressures from competitors or consumers, social network services may find themselves subject to low levels of what Anita Allen has, in analogous situations, termed state "coercion."[71] Thus, the FTC could exert marginal coercion by opening an investigation into social networking site defaults or, as is happening in Canada, apply additional yet still minimal coercion by demanding specific changes to the sites' settings.[72]

Whatever the drivers, changes in architecture clearly are foreseeable but are likely to be incremental. The fact that regulation of the physician-patient relationship and the protection of patient information are so entrenched in our health law models (common law, statute, constitutional law, command-control, ethical codes, etc.) makes it unlikely that courts and regulators will wait too long for better "code."

II. THE LEGAL (AND NOT SO LEGAL) FRAMEWORK

There are a multitude of emerging legal issues surrounding social network sites and the vast amounts of data contained on them. For example, social network data is of interest to anti-terrorist agencies in much the same way as email and telephone archives;[73] an Australian court allowed lawyers to serve notice of a default judgment via Facebook on two borrowers who had defaulted on a loan;[74] and social network postings have come under scrutiny in cases of jurors apparently researching and discussing cases on Twitter and Facebook.[75]

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71. *See* Anita L. Allen, *Unpopular Privacy: The Case for Government Mandates*, 32 OKLA. CITY U. L. REV. 87, 96-98 (2007) (discussing FTC regulation of telemarketing calls through the National Do Not Call Registry).

72. *See, e.g.*, Press Release, Office of the Privacy Comm'r of Can., Facebook Needs to Improve Privacy Practices, Investigation Finds (July 16, 2009), *available at* http://www.priv.gc.ca/media/nr-c/2009/nr-c_090716_e.cfm. Facebook responded with proposed changes to its policies and code; *see* Posting of Claire Cain Miller to Bits, http://bits.blogs.nytimes.com/2009/08/27/facebook-moves-to-improve-privacy-and-transparency (Aug. 27, 2009, 13:52 EST).

73. *See, e.g.*, *Social Network Sites 'Monitored'*, BBC NEWS ONLINE, Mar. 25 2009, http://news.bbc.co.uk/2/hi/uk_news/politics/7962631.stm (discussing telecommunications data retention under European Union directive).

74. Noel Towell, *Lawyers to Serve Notices on Facebook*, SYDNEY MORNING HERALD, Dec. 16, 2008, http://www.smh.com.au/news/technology/biztech/lawyers-to-serve-notices-on-facebook/2008/12/16/1229189579001.html.

75. John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1, *available at* http://www.nytimes.com/2009/03/18/us/18juries.html; Scott Michels, *Cases Challenged over 'Tweeting' Jurors: Lawyers Say They Will Appeal Verdicts After Jurors Comment on Facebook, Twitter*, ABC NEWS, Mar. 17, 2009, http://abcnews.go.com/Technology/Story?id=7095018&page=1; *Facebook, Twitter Throw US Legal System into Disarray*, ABC NEWS (Australia), Mar. 18, 2009, http://www.abc.net.au/news/stories/2009/03/18/2520009.htm; *see also* Kate Moser, *Court Lays Down Law on Jury Internet Use*, RECORDER, Sept. 9, 2009,

Even the status of the very media and data uploaded to social network sites is somewhat uncertain. For example, in February 2009 Facebook changed its terms of use, and for the first time suggested that it had persisting rights in some user-submitted content.[76] Although Facebook changed back to its earlier terms of use,[77] even under the current terms of use some user-uploaded content may persist (when shared with other subscribers or in back-ups) even when deleted by the user.[78]

This Article concentrates on just one risk-laden aspect of the use of such networks—the potential for category breakdown between social and healthcare professional uses and its implication for social and professional data. Given that we are concerned primarily with private actors (users of social network sites and those who would view, process, or aggregate user data), the reflexive response is to turn to the Law of Boundaries as the exclusive legal model. Within this concept, the common law of privacy governs social boundaries, while a more complex set of common law, ethical, and regulatory provisions governs professional boundaries. As will be seen, this intuitive response translates into an accurate picture of both the legal structures most likely to be applicable and the legal protection choices of those dissatisfied with treatment of their social network data. But the Law of Boundaries does not provide the exclusive options for dealing with category breakdown. Other options are present that may prove more or less attractive as these (and related) online interactions develop.

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http://www.law.com/flat/ltn/ 1202433656715.html (describing proposed San Francisco Superior Court rule on subject).

76. Brian Stelter, *Facebook's Users Ask Who Owns Information*, N.Y. TIMES, Feb. 17, 2009, at B3, *available at* http://www.nytimes.com/2009/02/17/technology/internet/17facebook.html.

77. *Facebook Backs Down, Reverses on User Information Policy*, CNN.COM, Feb. 18, 2009, http://www.cnn.com/2009/TECH/02/18/facebook.reversal/index.html.

78. Facebook, *Statement of Rights and Responsibilities*, http://www.facebook.com/terms.php.

> 2. Sharing Your Content and Information
>
> You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:
>
> > 1. For content that is covered by intellectual property rights, like photos and videos ("IP content"), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ("IP License"). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.
> >
> > 2. When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).

A. Options: Property, Liability, Inalienability, and Soft Law

The conventional wisdom is that interests in personal health data are protected by liability not property rules. Thus, health information is not directly protected as, for example, an intellectual property system might wall-off some scientific data. Rather, the law of boundaries (HIPAA included) places behavioral limits on those who would obtain or who are entrusted with health information.[79] Even some data protection rules that appear to flirt with property, such as rules that exclude regulation of de-identified personal health data,[80] are better understood as liability rules that provide safe harbors for data custodians who behave in certain ways.[81]

There are compelling arguments that property rules are underused in protecting personally identifiable information.[82] However, of more practical interest in the context of this article is the opening of a "third front," in addition to property or liability constructs: the option of protecting personal information on social networks with some form of inalienability rule.[83]

Stated broadly inalienability denotes non-transferability of an entitlement (herein personally identifiable data) even with (the data subject's) consent. Here Margaret Jane Radin's unpacking of inalienability is helpful as is her identification of "market-inalienability" that "places some things outside the marketplace but not outside the realm of social intercourse."[84] With a targeted inalienability regime it is possible to avoid the on (property) and sometimes off (liability) approaches to tradability in personal information. Specifically, we can impose bright line rules that target specific would-be uses or users of the data.

Recent developments in health information regulation suggest a growing interest in this targeted approach. For example, the recently-enacted federal Health Information Technology for Economic and Clinical Health Act (HITECH)[85] provides for market inalienability regarding information contained

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79. *See generally* NICOLAS P. TERRY, LEGAL ISSUES RELATED TO DATA ACCESS, POOLING, AND USE IN HEALTHCARE DATA IN PUBLIC GOOD OR PRIVATE PROPERTY? Ch. 4 (National Institutes of Health, forthcoming 2010).

80. *See, e.g.*, 45 C.F.R. § 160.103 (2009) (defining protected health information as that which is "individually identifiable").

81. *See, e.g.*, *id.* § 164.514(e)(3)(i) (de-identifying the data or complying with "limited data set" rules).

82. *See* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000) (dissecting the inapplicability of property as itself conclusory of the property and liberty rhetoric of those who would trade in the data of others).

83. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055 (2004).

84. Radin, *supra* note 83, at 1853.

85. *See infra* note 240 and accompanying text.

in a patient's electronic medical record.[86] Similarly, a handful of states have targeted specific uses of prescribing information collected by data aggregators on behalf of pharmaceutical manufacturers desirous of more efficient marketing of their drugs to physicians.[87] The data aggregators initially were successful in arguing that such statutes violated their commercial speech rights.[88] However, the First Circuit recently validated the regulatory approach when it characterized the limited target prohibition in the New Hampshire statute as restricting conduct, not speech.[89]

Moving forward, inalienability models are useful if we end up concluding that we want to wall-off the social network playground in a less extreme or more targeted manner than by using the Law of Boundaries. Inalienability rules could prohibit the acquisition of some online information by identified cohorts (for example, health insurers) or particular uses of such data (for example, employment-related decisions).[90]

Finally, in examining the palette of options for dealing with the interaction of social network information and the physician-patient relationship, we must consider soft law models of regulation. Soft law is notoriously difficult to define.[91] Previously discussed architectural or code approaches to data protection driven by standards bodies or industry associations likely would qualify for the soft law description. But in the present context the most important sources of non-legal, soft regulation are professional ethics codes; provisions of which will inform the discussion that follows.

Inalienability rules and soft law may not operate in series with liability rules (such as the Law of Boundaries). Just as common law rules tend to exhibit cycles of on/off switches punctuated by exceptionalism,[92] so highly targeted inalienability or soft law rules may occupy a transitional space while courts determine longer-term entitlements. Equally, narrowly constructed inalienability rules that are consistent with emerging architectural and soft law constructs in, say, being increasingly protective of social network data likely will propel the

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86. Health Information Technology for Economic and Clinical Health Act, 42 U.S.C.A. § 17935(d) (effective Feb. 17, 2010).

87. *See, e.g.*, N.H. REV. STAT. ANN. § 318:47-f (2009); ME. REV. STAT. ANN. 22 § 1711-E (Supp. 2009).

88. *See, e.g.*, IMS Health, Inc. v. Ayotte, 490 F. Supp. 2d 163 (D.N.H. 2007), *rev'd and vacated*, 550 F.3d 42 (1st Cir. 2008); IMS Health Corp. v. Rowe, 532 F. Supp. 2d 153 (D. Me. 2008).

89. *See* IMS Health Inc. v. Ayotte, 550 F.3d 42, 52 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009).

90. *See, e.g.*, Dina Epstein, *Have I Been Googled?: Character and Fitness in the Age of Google, Facebook, and YouTube*, 21 GEO. J. LEGAL ETHICS 715, 727 (2008) (arguing that the ABA should outlaw consideration of social network data for character and fitness determinations).

91. *See, e.g.*, Anna di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 500-01 (2006).

92. *See* Nicolas P. Terry, *Collapsing Torts*, 25 CONN. L. REV. 717, 736-38 (1993), building on EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-27 (1949).

courts utilizing conventional boundary law mechanisms towards a similarly protective stance.

B. The Law of Boundaries: Privacy Torts and Breach of Confidence

The Restatement's black-letter law of privacy fails to provide any general or comprehensive right of privacy. Rather, the common law of privacy consists of a group of nominate, discrete, and limited tort causes of action, somewhat unconvincingly bundled together in the RESTATEMENT (SECOND) OF TORTS.[93] Most jurisdictions recognize four causes of action for invasion of privacy: intrusion, public disclosure (or publicity) of private facts, false light, and appropriation (or exploitation) of another's name.[94] In the context of this article the intrusion and publicity torts are of most importance.[95]

Both the intrusion and publicity torts are collection-centric. That is, they provide for legal disincentives to the collection or exploitation of private information. The intrusion tort focuses on the manner of acquisition of the information while the publicity tort focuses on the content of the information.[96] In contrast, the action for breach of confidence recognized in most jurisdictions[97] is disclosure-centric and focuses on the underlying relational source of the information.[98]

Today courts tend to view the privacy tort as one of public disclosure of embarrassing facts.[99] As such it appears to have more in common with the

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93. RESTATEMENT (SECOND) OF TORTS §§ 652A-652I (1977); *see, e.g.*, Reid v. Pierce County, 961 P.2d 333, 339 (Wash. 1998) (en banc) (adopting § 652).

94. *See Reid*, 961 P.2d at 338-39; Estate of Berthiaume v. Pratt, 365 A.2d 792, 795 (Me. 1976); Loft v. Fuller, 408 So. 2d 619, 622 (Fla. Dist. Ct. App. 1981).

95. Of least importance in the context of this article are the "appropriation" (§ 652C) and "false light" torts. RESTATEMENT (SECOND) OF TORTS §§ 652C, 652E. Additionally, not all jurisdictions recognize the "false light" action primarily because it is somewhat duplicative of the tort of defamation. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1113 (Fla. 2008). *But see* Meyerkord v. Zipatoni Co., 276 S.W.3d 319, 326 (Mo. Ct. App. 2008) (joining majority of jurisdictions in recognizing "false light" claim and navigating overlap with defamation). Although not of particular relevance to the issues discussed herein, it is likely we will see considerable appropriation litigation regarding social network sites. *See, e.g.*, Web 2.0 Convergence, http://www.digitalcommunitiesblogs.com/web_20_convergence/2009/06/social-media-fraud-on-the-incr.php (June 8, 2009 14:32) (discussing impersonation of media and athletic personalities in twitter feeds).

96. *See* Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1441 (1982) (making a content-source distinction).

97. *Cf.* Meade v. Orthopedic Assocs. of Windham County, No. CV064005043, 2007 Conn. Super. LEXIS 3424, at *14 (Conn. Super. Ct. Dec. 27, 2007) (declining to recognize cause of action for breach of confidence).

98. *See, e.g.*, Burger v. Blair Med. Assocs., Inc., 964 A.2d 374, 378 (Pa. 2009); McCormick v. England, 494 S.E.2d 431, 435 (S.C. Ct. App. 1997).

99. Stratton v. Krywko, No. 248669, 2005 Mich. App. LEXIS 23, at *11 (Mich. Ct. App. Jan.

disclosure-centric confidentiality duty than the collection-centric intrusion tort. But it remains collection-centric side of the line because of its predicate that the defendant acquired private, embarrassing facts about the plaintiff before disclosure. In contrast, the confidentiality predicate is not one of acquisition by the defendant—rather, the plaintiff delivered the (typically) private information to the defendant in the context of a preexisting, fiduciary relationship.

Based as they are on underlying, preexisting relationships, breach of confidence actions are heavily dependent on context and the properties of the underlying relationship. In the context of the physician-patient relationship and the data entrusted in that context, the breach of confidence actions discussed below are variously based on responsibilities imposed by licensing statutes, the physician's evidentiary privilege, common law principles of trust, the Hippocratic Oath, and general principles of medical ethics.[100]

1. Intrusion upon Seclusion.—The RESTATEMENT (SECOND) describes the intrusion upon seclusion tort as follows: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[101] Today, courts require the satisfaction of four elements: (1) an unauthorized intrusion or prying into plaintiff's seclusion; (2) the intrusion is highly offensive or objectionable to a reasonable person; (3) the matter upon which the intrusion occurs must be private; and (4) the intrusion causes anguish and suffering.[102]

The intrusion tort originally required a literal, physical intrusion; this is no longer the case. Courts now tend to look less at the physicality of the defendant's action and more at the level of its offensiveness.[103] The foundation of the action

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6, 2005).

100. Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 590-91 (D.C. 1985).

101. RESTATEMENT (SECOND) OF TORTS § 652B (1966); *see also id.* § 652B cmts. a, b:

> a. The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.
>
> b. The invasion may be by . . . . some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account . . . .

102. *See, e.g.*, Lovgren v. Citizens First Nat'l Bank of Princeton, 534 N.E.2d 987, 989 (Ill. 1989) (recognizing requirement that intrusion must be "highly" offensive); Schmidt v. Ameritech Ill., 768 N.E.2d 303, 311 (Ill. App. Ct. 2002); *see also Vassiliades*, 492 A.2d at 588 (requiring showing that intrusion be "highly offensive"); Melvin v. Burling, 490 N.E.2d 1011, 1013-14 (Ill. App. Ct. 1986).

103. *See, e.g.*, Bonanno v. Dan Perkins Chevrolet, No. CV 99066602, 2000 Conn. Super. LEXIS 287, at *4-5 (Conn. Super. Ct. Feb. 4, 2000). *See generally* Goodrich v. Waterbury Republican-Am., Inc., 448 A.2d 1317 (Conn. 1982); Johns v. Firstar Bank, No. 2004-CA-001558-

remains an "intentional and unwarranted acquisition by the defendant."[104]

A "wrongful intrusion may occur in a public place, so long as the thing into which there is intrusion or prying is entitled to be private."[105] "However, generally, the observation of another person's activities, when that other person is exposed to the public view, is not actionable. . . ."[106] Thus, training a surveillance camera on the outside of a house likely will not be an intrusion.[107] However, observing people through holes poked in the ceiling of a restroom,[108] or by use of a camera installed in a medical examination room,[109] clearly satisfy the element.

As the courts' understanding of an actionable intrusion has become more existential, their approach has become more nuanced. In the words of one court: "Assuming that the matter is entitled to be private, then the court will consider two primary factors in determining whether an intrusion is actionable: (1) the means used, and (2) the defendant's purpose for obtaining the information."[110] In general, contrasting sharply with other boundary torts, "[i]ntrusion into solitude appears to be based on the manner in which a defendant obtains information, and not what a defendant later does with the information."[111]

2. Public Disclosure of Private Facts.—The publicity tort, targeting those who give "publicity to a matter concerning the private life"[112] of the plaintiff, applies to "[o]ne who gives publicity to a matter concerning the private life of another"[113] if the data "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[114] Modern courts state a granular version of the doctrine as requiring:

> (1) the fact or facts disclosed must be private in nature; (2) the disclosure must be made to the public; (3) the disclosure must be one which would be highly offensive to a reasonable person; (4) the fact or facts disclosed cannot be of legitimate concern to the public; and (5) the defendant acted with reckless disregard of the private nature of the fact or facts disclosed.[115]

A key distinction between the intrusion and publicity causes of action is that

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MR, 2006 Ky. App. LEXIS 85, at *7-9 (Ky. Ct. App. Mar. 24, 2006).

104. Burger v. Blair Med. Assocs., Inc., 964 A.2d 374, 379 (Pa. 2009).

105. Martin v. Patterson, 975 So. 2d 984, 994 (Ala. Civ. App. 2007) (citations omitted).

106. Johnson v. Stewart, 854 So. 2d 544, 549 (Ala. 2002) (citing I.C.U. Investigations, Inc. v. Jones, 780 So. 2d 685 (Ala. 2000)).

107. Schiller v. Mitchell, 828 N.E.2d 323, 327-29 (Ill. App. Ct. 2005).

108. *See* Benitez v. KFC Nat'l Mgmt. Co., 714 N.E.2d 1002, 1033-34 (Ill. App. Ct. 1999).

109. Acuff v. IBP, Inc., 77 F. Supp. 2d 914, 919-21 (C.D. Ill. 1999).

110. *Martin*, 975 So. 2d at 994 (citations omitted).

111. Fernandez-Wells v. Beauvais, 983 P.2d 1006, 1010 (N.M. Ct. App. 1999).

112. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

113. *Id.*

114. *Id.*

115. Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 379 (Colo. 1997).

although the former "requires *no* showing of publication or publicity,"[116] the publicity action rotates around the *public disclosure* of private facts.[117]

3. Breach of Confidence.—The privacy torts closely resemble intentional torts such as outrage,[118] in that they rotate around intentional interferences[119] that are "highly offensive to a reasonable person."[120] In contrast, the breach of confidence tort is essentially a strict liability action,[121] as befits a tort claim that has its roots in implied contract and fiduciary duties.[122]

Confidentiality, or rather the tort of breach of confidence, is disclosure-centric. The breach of confidence tort applies only to those who have been entrusted with information in confidence.[123] Accordingly:

> The [fiduciary or confidential] relationship arises when one person reposes special trust and confidence in another person and that other person—the fiduciary—undertakes to assume responsibility for the affairs of the other party. The person upon whom the trust and confidence is imposed is under a duty to act for and to give advice for the benefit of the other person on matters within the scope of the relationship. Fiduciary duties are the highest standard of duty imposed by law.[124]

It follows that "only one who holds information in confidence can be charged with a breach of confidence,"[125] while "an act [that] qualifies as a tortious invasion of privacy, it theoretically could be committed by anyone."[126] The converse is true; if information that is not secret or private is entrusted in

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116. Corcoran v. Sw. Bell Tel. Co., 572 S.W.2d 212, 215 (Mo. Ct. App. 1978); *see also* Lovgren v. Citizens First Nat'l Bank, 534 N.E.2d 987, 989 (Ill. 1989) ("The basis of the tort is not publication or publicity. Rather, the core of this tort is the offensive prying into the private domain of another.").

117. *See, e.g.*, Tureen v. Equifax, Inc., 571 F.2d 411, 419 (8th Cir. 1978) (requiring "disclosure to the general public or likely to reach the general public").

118. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

119. *See, e.g.*, Meyerkord v. Zipatoni Co., 276 S.W.3d 319, 326 (Mo. Ct. App. 2008) (requiring plaintiff allege that defendant acted with "knowledge of or with reckless disregard").

120. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

121. *See* Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 591 (D.C. 1985).

122. *See generally* Biddle v. Warren Gen. Hosp., 715 N.E.2d 518, 523 (Ohio 1999) (noting that the physician-patient relationship includes a fiduciary character component); Overstreet v. TRW Commercial Steering Div., 256 S.W.3d 626, 631-32 (Tenn. 2008) (discussing covenants of confidentiality for contracts implied in fact and contracts implied in law); McCormick v. England, 494 S.E.2d 431, 434 (S.C. Ct. App. 1997) (recognizing modern tort law basis of action).

123. *See, e.g.*, Johns v. Firstar Bank, No. 2004-CA-001558MR, 2006 Ky. App. LEXIS 85, at *8-9 (Ky. Ct. App. Mar. 24, 2006) (finding that privacy torts are not applicable to a case where plaintiff disclosed information to defendant; any action would have to lie in breach of confidence).

124. *Overstreet*, 256 S.W.3d at 641-42 (Koch, J., concurring) (internal citations omitted).

125. Humphers v. First Interstate Bank, 696 P.2d 527, 530 (Or. 1985) (en banc).

126. *Id.*

confidence, its subsequent disclosure may be actionable.[127] Although there can be overlap, "neither of the torts of invasion of privacy nor breach of confidentiality is entirely subsumed within the other."[128]

The breach of confidence tort not only is a stricter form of liability than privacy theories, but also eschews the defensive arguments available in the latter. For example, "[a] defendant is not released from an obligation of confidence merely because the information learned constitutes a matter of legitimate public interest."[129]

C. Privacy Expectations and Social Networks

Obviously privacy policies do not protect social network subscribers from legal process.[130] Increasingly, and as happened with email, social network subscribers' private profile pages are drawn into public processes through subpoena or discovery.[131] For example, there have been media reports of prosecutors using photographs posted on defendants' social network sites to bolster their arguments in sentencing hearings.[132] Indeed, a growing number of cases involve discovery or related procedural requests by defendants.[133] Representative fact-patterns include workplace sexual harassment claims, where the defendant argues that the plaintiff consensually engaged in similar behaviors online,[134] and any number of cases where the defense seeks to make an issue out of the social network subscriber's emotional state.[135]

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127. *See id.* at 528.

128. Burger v. Blair Med. Assocs., Inc., 964 A.2d 374, 381 (Pa. 2009).

129. Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 591 (D.C. 1985) (citing Vickery, *supra* note 96, at 1468).

130. *See, e.g.*, Facebook's Privacy Policy, http://www.facebook.com/policy.php (last visited Dec. 30, 2009) ("We may disclose information pursuant to subpoenas, court orders . . . if we have a good faith belief that the response is required by law.").

131. *See, e.g.*, Ronald J. Levine & Susan L. Swatski-Lebson, *Are Social Networking Sites Discoverable?*, PRODUCT LIABILITY L. & STRATEGY, Nov. 13, 2008, *available at* http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202425974937.

132. *See* Associated Press, *Facebook Evidence Sends Unrepentant Partier to Prison*, FOX NEWS.COM, July 21, 2008, http://www.foxnews.com/story/0,2933,386241,00.html.

133. *See generally* Carole Levitt & Mark Rosch, *How Lawyers Can Mine a Social Network for Personal Information*, 16 NEV. LAW. 12 (2008).

134. *See, e.g.*, Mackelprang v. Fid. Nat'l Title Agency of Nev., Inc., No. 2:06-cv-00788-JCM-GWF, 2007 U.S. Dist. LEXIS 2379, at *8-9 (D. Nev. Jan. 9, 2007).

135. *See, e.g.*, Mary Pat Gallagher, *MySpace, Facebook Pages Called Key to Dispute Over Insurance Coverage for Eating Disorders*, 191 N.J.L.J. 309, Feb. 1, 2008, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005559933 (discussing *Beye v. Horizon* and *Foley v. Horizon*, in which defendant's health insurer argued that access to social network pages could assist in a defense for denial of coverage for anorexia or bulimia because conditions were emotionally rather than biologically caused); Henry Gottlieb, *MySpace, Facebook Privacy Limits Tested in Emotional Distress Suit*, 188 N.J.L.J. 845, June 14, 2007, *available at*

In such cases the exact legal status of social network content vis-à-vis user expectations tends to be obscured by proceedings that depend in large part on highly individualized facts and trial court discretion. Only occasionally have courts dealt directly with a social network user's expectations of those who can see their posts, or the more complex legal question of the user's privacy expectations.

A.B. v. State[136] concerned a juvenile who posted a vulgar tirade against her ex-middle school principal on a MySpace page. That page was on a profile falsified as the principal's but actually created by one of the defendant's friends.[137] A total of twenty-six friends including the defendant were given access to the fake profile.[138] At trial the defendant was adjudicated a delinquent child on the basis that, if she had been an adult at the time of the crime, she would have committed the statutory offense of harassment.[139] The requisite intent for the harassment offense in question included "a subjective expectation that the offending conduct will likely come to the attention of the person targeted for the harassment."[140] Given the sparse record, the prosecution's reasonable doubt burden, and a lack of any independent evidence as to the workings of the social network site, the court reversed the adjudication.[141] Specifically, the court determined that there was no probative evidence that the defendant, who posted to a limited group of friends rather than the public, had the requisite expectation that the act would come to the principal's intention.[142]

In *Moreno v. Hanford Sentinel, Inc.*,[143] a college student posted comments critical of her hometown on her MySpace site. Although she removed the posting six days later, the post had already been copied to her hometown's newspaper for republication.[144] She sued the newspaper and her high school principal who had transmitted the posting to a reporter for, inter alia, breach of privacy.[145] Citing *Hill v. National Collegiate Athletic Ass'n*,[146] the Supreme Court of California's most recent guide, the court noted that such a claim "is not 'so much one of total secrecy as it is of the right to *define* one's circle of

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http://www.law.com/jsp/LawArticleFriendly-jsp?id (discussing *T.V. v. Union Township Board of Education*, defendant school district sought access to social networks pages to potentially challenge plaintiffs credibility in an action for emotional injuries).

136. 885 N.E.2d 1223 (Ind. 2008).

137. *Id.* at 1225.

138. *Id.*

139. *Id.* at 1223-25.

140. *Id.* at 1226.

141. *Id.* at 1228.

142. *Id.* at 1227-28. The court seemed less sure about how to deal with another posting by the defendant on a different, public *MySpace* profile page, but ultimately found the evidence wanting as to intent. *Id.*

143. 91 Cal. Rptr. 3d 858 (Ct. App. 2009).

144. *Id.* at 861.

145. *Id.*

146. 865 P.2d 633 (Cal. 1994).

intimacy—to choose who shall see beneath the quotidian mask.'"[147] The *Moreno* court concluded:

> [The plaintiff] publicized her opinions . . . by posting . . . on myspace.com, a hugely popular internet site. [Her] affirmative act made her article available to any person with a computer and thus opened it to the public eye. Under these circumstances, no reasonable person would have had an expectation of privacy regarding the published material.[148]

The opinion does not state whether the plaintiff had set her MySpace privacy settings to restrict access to her site to her approved "friends." As it stands, the opinion seems to suggest that simply posting to a social network site defeats the expectation of privacy; a position that is challenged below.[149]

D. Privacy and Confidentiality in Healthcare

The privacy and confidentiality rules applied to healthcare providers and to some patient information are both more complex and more granular. At common law, the collection-centric privacy tort is represented by a relatively small collection of cases that suggest healthcare provider liability will be restricted to a narrow range of outlying fact situations. Such a state is unsurprising given that the privacy torts lack any unifying concept and have failed to develop robust, plaintiff-friendly doctrine.

Consider, for example, the classic case of *Knight v. Penobscot Bay Medical Center*.[150] A nurse's husband arrived at a hospital to pick her up.[151] "To give [him] something interesting to do while he" waited, the husband was gowned and permitted to observe a stranger's labor and delivery.[152] Notwithstanding the rather obvious nature of this intrusion, the plaintiff's cause of action failed because there was no evidence that the nurse's husband had *intended* the intrusion into the patient's seclusion.[153]

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147. *Moreno*, 91 Cal. Rptr. 3d at 863 (quoting M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 511 (Ct. App. 2001)). *Hill* also analyzed the privacy tort rights as follows:

> Each of the four categories of common law invasion of privacy identifies a distinct interest associated with an individual's control of the process or products of his or her personal life. To the extent there is a common denominator among them, it appears to be improper interference (usually by means of observation or communication) with aspects of life consigned to the realm of the "personal and confidential" by strong and widely shared social norms.

Hill, 865 P.2d at 647.

148. *Moreno*, 91 Cal. Rptr. 3d at 862.

149. *See* text accompanying *infra* notes 323-29.

150. 420 A.2d 915 (Me. 1980).

151. *Id.* at 916-17.

152. *Id.* at 917.

153. *Id.* at 918; *see also* Fisher v. Dep't of Health, 106 P.3d 836, 840 (Wash. Ct. App. 2005) (requiring a "deliberate intrusion"); Kindschi v. City of Meriden, No. CV064022391, 2006 Conn.

Similar limitations that are instructive on the application of the privacy torts to social network scenarios derive from the torts' offensiveness and privacy expectation limitations. Take, for example, *Adamski v. Johnson*,[154] a case that involved intrusion and publicity allegations by the plaintiff against her employer. Plaintiff provided her employer with notice that she would be undergoing surgery, but when asked she refused to supply additional information about the surgery.[155] Allegedly, her supervisor applied pressure to her co-employees and acquired that information.[156] The defendants' apparently intentional conduct notwithstanding, the court granted defendants' demurrer.[157] First, the court did not view the disclosed information regarding the nature of the surgery as either an intrusion or public disclosure of private facts that could be "'highly offensive'" to a reasonable person.[158] Second, the plaintiff's inchoate allegation that her supervisor relayed the information to others was dismissed on the basis that it did not allege facts to suggest that the disclosure went beyond a single person or small group of persons.[159] Third, the plaintiff's own disclosure of the nature of the surgery to a small group of co-workers reinforced the defense position that the intrusion was not offensive and rendered the publicity claim untenable by eliminating her expectation of privacy.[160]

Notwithstanding these limitations inherent in the common law doctrines, there is a considerable body of case law that applies privacy doctrine with some rigor to medical fact patterns and suggests some legal jeopardy for medical professionals posting or micro-blogging information about their patients. As noted as early as 1942 by the Supreme Court of Missouri, "if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition (at least if it is not contagious or dangerous to others) without personal publicity."[161] As more recently stated by a district court in Illinois, "[t]here are few things in life that are more private than medical treatments and/or examinations."[162]

1. Intrusion Actions.—Estate of Berthiaume v. Pratt concerned two series of photographs taken of a patient suffering from cancer of the larynx.[163] The first

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Super. LEXIS 3666, at *8-9 (Conn. Super. Ct. Nov. 27, 2006) (requiring an intentional invasion upon the plaintiff's privacy).

154. 80 Pa. D. & C.4th 69 (Comm. Pl. 2006).

155. *Id.* at 70-71.

156. *Id.* at 71.

157. *Id.* at 78.

158. *Id.* at 74.

159. *Id.* at 76.

160. *Id.* at 77; *see also* Fletcher v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871, 878 (8th Cir. 2000) (holding that plaintiff lost expectation of privacy when she shared information about a staph infection with co-workers).

161. Barber v. Time, Inc., 159 S.W.2d 291, 295 (Mo. 1942).

162. Acuff v. IBP, Inc., 77 F. Supp. 2d 914, 924 (C.D. Ill. 1999).

163. 365 A.2d 792, 793 (Me. 1976).

series was taken during the patient's treatment and apparently with his consent.[164] A second series was taken as the patient was dying and there was evidence that the patient objected to the taking of this second set of photographs.[165] The court reversed the defendant's directed verdict and held that this intrusion claim should have been submitted to the jury.[166] Although the court recognized "the benefit to the science of medicine which comes from the making of photographs of the treatment and of medical abnormalities found in patients,"[167] this could not be done without the subject's consent.[168]

Stratton v. Krywko concerned a plaintiff involved in an automobile accident.[169] She was taking Prozac and on the night of the accident consumed alcohol and marijuana.[170] With the consent of emergency services and the local hospital, a documentary crew was riding with the paramedics who treated the patient at the scene of the accident and transported her to the emergency room.[171] Plaintiff refused to sign any consent to the filming.[172] In subsequent broadcasts plaintiff's face was digitally obscured.[173] However, she was referred to by her first name and her name and address were visible on a report shown in the video.[174] A physician could be heard referring to her as "[n]o allergies, on Prozac."[175] Given that "defendants filmed plaintiff in the emergency room after she was presented with and explicitly *refused* to sign the informed consent release,"[176] the court held that her intrusion allegation should have been presented to the jury.[177]

Both *Berthiaume* and *Stratton* reaffirm the collection-centric nature of the intrusion action. However, both cases concern the judicial protection of overtly physical spaces and tell us little about the resolution of potential claims involving intrusion into a pseudo-secluded space such as a Facebook profile.

2. Publicity Actions.—Whether information is private depends in part on the type of information and the extent that the subject keeps the information from the public. Thus, "[s]exual relations . . . are normally entirely private matters, as are . . . many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, [and] most details of a man's life in his home."[178] Indeed,

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164. *Id.*
165. *Id.*
166. *Id.* at 795.
167. *Id.* at 796.
168. *Id.* at 796-97.
169. No. 248669, 2005 Mich. App. LEXIS 23, at *1-2 (Mich. Ct. App. Jan. 6, 2005).
170. *Id.*
171. *Id.* at *3.
172. *Id.*
173. *Id.* at *3-4.
174. *Id.*
175. *Id.*
176. *Id.* at *22.
177. *Id.*; *see also* Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Ct. App. 1986).
178. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

"[m]atters concerning a person's medical treatment or condition are also generally considered private."[179] Just as the taking of photographs can constitute an intrusion,[180] so the publicity tort may apply to their distribution. For example, one court opined, "[w]e fail to see how autopsy photographs of the Plaintiffs' deceased relatives do not constitute intimate details of the Plaintiffs' lives or are not facts Plaintiffs do not wish exposed 'before the public gaze.'"[181] On the other hand, "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye."[182]

The core component of the publicity tort is, not surprisingly, that the defendant gave publicity to this private information. The relevant RESTATEMENT (SECOND) OF TORTS comment provides:

> it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication.[183]

In this context, *Vassiliades v. Garfinckel's, Brooks Brothers* is instructive.[184] A patient brought an action against her plastic surgeon for invasion of privacy (publicity) after the surgeon used "before" and "after" photographs of her (taken with her consent) in promotional events at a department store and on television.[185] Evidence had been offered at trial by the plaintiff that "after agonizing over losing her youthful appearance and contemplating plastic surgery for many years, she underwent plastic surgery and kept her surgery secret, telling only family and very intimate friends."[186] For the court, there was no touchstone regarding who had seen the photographs or even whether her name had been published. Rather "[t]he nature of the publicity ensured that it would reach the public."[187]

This contrasts with *Robert C. Ozer, P.C. v. Borquez*.[188] The plaintiff's partner was diagnosed with AIDS and the plaintiff himself was advised to take

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179. Doe v. Mills, 536 N.W.2d 824, 829 (Mich. Ct. App. 1995) (citation omitted).
180. *See* Estate of Berthiaume v. Pratt, 365 A.2d 792, 793 (Me. 1976).
181. Reid v. Pierce County, 961 P.2d 333, 341 (Wash. 1998).
182. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b. (1977).
183. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a. (1977).
184. *See* 492 A.2d 580, 585 (D.C. 1985).
185. *Id.* at 584.
186. *Id.* at 587.
187. *Id.* at 588.
188. 940 P.2d 371 (Colo. 1997).

an HIV test.[189] Asking for confidence the plaintiff, an associate at a law firm, told his law firm president that he was gay, that he needed to be tested, and wished for some help covering a previously scheduled deposition.[190] One-week later the plaintiff was terminated, but not before he discovered that the information had been shared with everyone in the law firm.[191] The court reversed a jury verdict in the plaintiff's favor on a "publicity" count because of a defective jury instruction; the trial court had required only that the private information be "published" to another.[192] As the Colorado Supreme Court concluded, "the public disclosure requirement renders [defendant] liable for [plaintiff's] invasion of privacy claim only if [defendant] disclosed [plaintiff's] situation to a large number of persons or the general public."[193] As discussed below, *Vassiliades* and *Ozer* are not at odds with each other. Rather, modern courts recognize a more granular interpretation of the publicity tort. The "publicity" can occur either: (1) through "private" channels, thus triggering an additional requirement of a considerable number of recipients; or (2) through a "public" channel, anything from a sign in a shop window to a television broadcast, in which case there is no additional numerical touchstone.[194]

Given that the action rotates around private facts being made public, plaintiffs will have weaker cases when there has been some level of self-disclosure. *Stratton v. Krywko*, the television documentary case discussed above, was close to the line.[195] The defendants had successfully argued in their motion for summary judgment that the information disclosed about the plaintiff (such as her face, x-ray/cat scan data, status, prognosis, and Prozac prescription) was already public.[196] The appellate court agreed with regard to many of the items (for example, a public street accident, the police report of the accident) although others (e.g., scans) were not specifically identified during the broadcasts as hers.[197] However, the court considered that there was an issue of triable fact whether her Prozac prescription was known to "everybody" as argued by defendants or known to only a "select number of close friends and family."[198] As the court recognized, "[p]laintiff's argument has merit. Disclosing a fact to a small number of confidants does not equate to making the information public."[199]

Another issue that arises in publicity cases is whether the publicity reaches the "highly offensive" threshold. This question of offensiveness to a reasonable person is an issue of fact for the jury. For example, the court in *Vassiliades*

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189. *Id.* at 373.
190. *Id.* at 374.
191. *Id.*
192. *Id.* at 379.
193. *Id.*
194. *See* discussion accompanying *infra* note 324.
195. No. 248669, 2005 Mich. App. LEXIS 23 (Mich. Ct. App. Jan. 6, 2005).
196. *Id.* at *12.
197. *Id.* at *14.
198. *Id.* at *15.
199. *Id.*

would not substitute its own views for a jury determination that the publication of "before" and "after" photographs met this test.[200]

The publicity tort can be defeated in the case of the qualified "legitimate public interest in the publication," either at common law or when the First Amendment is implicated.[201] Notwithstanding, when balancing out these interests, courts tend to favor the individual's right to privacy:

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.[202]

Gilbert v. Medical Economics Co.[203] concerned an article in defendant's magazine that discussed incidents of alleged malpractice committed by the plaintiff anesthesiologist. The article discussed the plaintiff's history of psychiatric and related personal problems in making the argument that there had been a breakdown in the regulatory system.[204] The court affirmed the defendant's summary judgment on the application of the defense noting "the legitimate public interest of warning potential future patients, as well as surgeons and hospitals, of the risks they might encounter in being treated by or in employing the plaintiff."[205]

The most difficult issue in these public interest cases is the assessment of the value of the specific identification. Consider again *Stratton v. Krywko*, where the defendants persuaded the trial court that the First Amendment protected their "Night in the E.R." documentary as newsworthy or educational.[206] The court reaffirmed the duality of this inquiry: "not only must the overall subject-matter be newsworthy, but also the particular facts [regarding the plaintiff] revealed."[207] On these facts, the court considered summary adjudication to be improper.[208] When dealing with this issue the courts, as noted in *Vassiliades*,[209] seek a "logical

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200. Vassiliades v. Garfinkel's, Brooks Bros., 492 A.2d 580, 588 (DC. 1985).

201. *Id.* at 588-89; *see also* Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981); Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 378 n.8 (Colo. 1997) (discussing First Amendment's applicability); Fisher v. Dep't of Health, 106 P.3d 836, 841 (Wash. Ct. App. 2005) (holding that "the government *may* have had *no* legitimate interest in the dissemination of this private information sufficient to outweigh Ms. Fisher's protected privacy interest. But she must show that the extent of the dissemination outweighed her own privacy interest").

202. RESTATEMENT (2ND) OF TORTS, § 652D cmt. h (1977).

203. 665 F.2d 305 (10th Cir. 1981).

204. *Id.* at 307-08.

205. *Id.* at 309.

206. Stratton v. Krywko, No. 248669, 2005 Mich. App. LEXIS 23, at *15-16 (Mich. Ct. App. Jan. 6, 2005).

207. *Id.* at *20.

208. *Id.*

209. Vassiliades v. Garfinkel's, Brooks Bros., 492 A.2d 580, 585 (D.C. 1985).

nexus" between the legitimate public interest and the particular publicity given to the plaintiff's private information.[210]

3. Confidentiality Actions.—As discussed above, the tort action for breach of confidence is disclosure-centric and dependent on context. There is also a chronology at play, and as persuasively argued by Leslie Francis, it is a chronology not a prioritization.[211] A patient exercises this right of privacy when he or she chooses to provide information to a physician; "[i]f it were otherwise, patients would be reluctant to freely disclose their symptoms and conditions to their physicians in order to receive proper treatment."[212] That information then ceases to be private vis-à-vis the physician. Thereafter, dissemination of that information by the physician is limited by the requirement of confidence.[213] "One of the fiduciary duties that a physician assumes when he or she undertakes to treat a patient is the duty to refrain from disclosing a patient's confidential health information unless the patient expressly or impliedly consents or unless the law requires or permits disclosure."[214]

The modern trend is to apply a tort-based breach of confidence action regarding unauthorized disclosure of medical information.[215] For example, in *Biddle v. Warren General Hospital*, the court recognized both healthcare provider liability for either "unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship"[216] or third party liability for "inducing the unauthorized, unprivileged disclosure of nonpublic medical information."[217]

In enforcing the duty of confidentiality regarding medical information courts are particularly protective of medical records.[218] For example, in *Hageman v. Southwest General Health Center*,[219] the Supreme Court of Ohio reaffirmed its holding in *Biddle* and held a lawyer liable for breach of confidence when she passed medical records lawfully obtained in a divorce case to a prosecutor in a related matter.[220]

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210. *Id.* at 589-90 (citations omitted).

211. Leslie Pickering Francis, *Privacy and Confidentiality: The Importance of Context*, 91 MONIST 52, 52-67 (2008).

212. Overstreet v. TRW Commercial Steering Div., 256 S.W.3d 626, 642 (Tenn. 2008) (citations omitted).

213. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 410 (4th ed. 1994).

214. *Overstreet*, 256 S.W.3d at 642 (citations omitted).

215. *See* McCormick v. England, 494 S.E.2d 431, 437 (S.C. Ct. App. 1997).

216. 715 N.E.2d 518, 523 (Ohio 1999).

217. *Id.* at 528.

218. Hageman v. Sw. Gen. Health Ctr., 893 N.E.2d 153, 155-56 (Ohio 2008).

219. *Id.*

220. *Id.* at 157-58; *see, e.g.*, Burger v. Blair Med. Assocs., 964 A.2d 374 (Pa. 2009); Jeffrey H. v. Imai, Tadlock & Keeney, 101 Cal. Rptr. 2d 916, 918-19 (Ct. App. 2000), *overruled in part by* Jacob B. v. County of Shasta, 154 P.3d 1003, 1012 (Cal. 2007); Anonymous v. CVS Corp., 728 N.Y.S.2d 333, 335 (Sup. Ct. 2001) (discussing pharmacy records).

Although there is no public interest defense to breach of confidence,[221] "a physician or hospital is privileged to disclose otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty, or where disclosure is necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality."[222] As with the statutory and regulatory confidentiality codes discussed below, breach of confidentiality actions can be met by defensive arguments that the disclosure was compelled by law,[223] is in the best interest of the patient or others,[224] or the patient has given express or implied consent to the disclosure.[225]

E. Ethical Restraints

Just as system architecture creates a soft law alternative to boundary law or governmental coercion, so the existing ethical boundaries that hover over the physician-patient relationship create a soft law approach to modulating the behaviors of some social network actors.

Basic medical professional ethics structures map quite well to the common law confidentiality and privacy restraints. Thus, the American Medical Association (AMA) Code of Medical Ethics combines its disclosure-centric requirement of confidence ("The physician should not reveal confidential information without the express consent of the patient") with the principle's instrumental justification ("The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services").[226] Similarly, the AMA's approach to collection-centric rules includes an "intrusion"-like privacy principle demanding protection of patient privacy as it relates to physical [privacy] "which focuses on individuals and their personal spaces."[227] However, the ethical rules also extend to associational ("family or other intimate relations"), informational ("specific personal data"), and decisional privacy ("personal choices").[228]

As discussed above, the legal domain's case-by-case approach to physician-patient privacy has added few bright line rules to the basic seclusion-intrusion or related mandates. In contrast, the AMA principles do bright line some specific fact-patterns.

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221. *See* Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 591 (D.C. 1985).

222. *Biddle*, 715 N.E.2d at 524.

223. McCormick v. England, 494 S.E.2d 431, 439 (S.C. Ct. App. 1997).

224. *Id.*

225. Snavely v. AMISUB of S.C., Inc., 665 S.E.2d 222, 225 (S.C. Ct. App. 2008), *cert. denied* (Apr. 10, 2009).

226. AMA, CODE OF MEDICAL ETHICS § 5.05—Confidentiality (2007), http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion505.shtml.

227. *Id.* § 5.059—Privacy in the Context of Health Care, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion5059.shtml.

228. *Id.*

Thus, physicians who participate in "interactive online sites that offer email communication" are expected to adhere to the AMA's guidelines on email.[229] It might seem that these guidelines would apply only to the email-like features grafted on to social network sites. However, the AMA opinion could be interpreted to provide guidelines for broader physician participation online and so prohibit the establishment of a physician-patient relationship through an online social network. Further, if a physician-patient relationship already existed such guidelines would require informed consent as to the limitations and risks associated with social network communication, and demand a regard for privacy and confidentiality that may be unattainable in the online social network context.[230]

The AMA ethical guidelines specifically address both contemporaneous and recorded observation of physician-patient interactions, scenarios that may point to the correct approach to social network "broadcasts" such as Facebook posts or Twitter streams. For example, the ethical approach to "outside observers"[231] requires their prior agreement to confidentiality and their presence is conditioned on "the patient's explicit agreement."[232] Similarly, with regard to filming and broadcasting encounters, the "educational objective can be achieved ethically by filming only patients who can consent."[233] Such consent must be obtained for both the filming and subsequent broadcasting.[234] Any such consent must be informed and thus is predicated on: "[A]n explanation of the educational purpose of film, potential benefits and harms (such as breaches of privacy and confidentiality), as well as a clear statement that participation in filming is voluntary and that the decision will not affect the medical care the patient receives."[235] Furthermore, the guidelines assume that the filming and broadcast will be limited to healthcare professionals and their students. If any broader audience is contemplated, that must be the subject of an additional, explicit consent.[236]

The framing of both the provisions on outside observers and filming are

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229. *Id.* § 5.027(3)—Use of Health-Related Online Sites, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion5027.shtml.

230. *Id.* § 5.026—The Use of Electronic Mail (2008-09), http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion5026.shtml.

231. *Id.* § 5.0591—Patient Privacy and Outside Observers to the Clinical Encounter, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion50591.shtml (defining "outside observers" as "individuals who are present during patient-physician encounters and are neither members of a health care team nor enrolled in an educational program for health professionals").

232. *Id.*

233. *Id.* § 5.045(1)-(2)—Filming Patients in Health Care Settings, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion5045.shtml.

234. *Id.*

235. *Id.* § 5.046—Filming Patients for the Education of Health Professionals, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion5046.shtml.

236. *Id.*

sufficiently analogous to Internet broadcasting through social network sites that the additional considerations regarding confidentiality and informed consent are significant. First, the AMA notes that, "[p]hysicians should avoid situations in which an outside observer's presence may negatively influence the medical interaction and compromise care."[237] Second, "physicians should be aware that filming may affect patient behavior during a clinical encounter. The patient should be given ample opportunity to discuss concerns about the film, before and after filming, and a decision to withdraw consent must be respected."[238] Third, the ethical rules that acknowledge the requirement for explicit consent are based on the recognition that "filming cannot benefit a patient medically and may cause harm."[239]

F. HIPAA and Related Regulatory Models

Although reasonably well-developed areas of law by the late 1990s, the breach of confidence tort and related state statutes[240] were deemed inadequate to meet the needs of electronic, interoperable billing, and records systems. Starting in 2000, therefore, the breach of confidence tort has been supplemented by HIPAA, a federal confidentiality code (albeit one that is mislabeled as dealing with "privacy").[241]

Today, the HIPAA code is the most important source of regulation regarding disclosures of patient information by healthcare providers.[242] It is not the exclusive source because HIPAA is quite limited in its reach[243] and only partially preempts state confidentiality laws.[244] Much of the HIPAA regulatory framework is not directed at protecting patient information but creating the "exceptional" processes by which such data may be disseminated (such as patient consent) or creating broad safe harbors for public health, judicial, and regulatory

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237. *Id.* § 5.0591—Patient Privacy and Outside Observers to the Clinical Encounter, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion50591.shtml.

238. *Id.* § 5.046(1)-(2)—Filming Patients for the Education of Health Professionals, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion5046.shtml.

239. *Id.* § 5.045(2)—Filming Patients in Health Care Settings, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion5045.shtml.

240. *See, e.g.*, CAL. CIV. CODE §§ 56–56.37 (West 2007); MONT. CODE ANN. §§ 50-16-501 to -553 (West Supp. 2009); WASH. REV. CODE ANN. §§ 70.02.005 to -.904 (West 2002 & Supp. 2009); WIS. STAT. § 146.83 (West Supp. 2009).

241. 45 C.F.R. § 164.500-534 (2009).

242. HIPPA Basics: Medical Privacy in the Electronic Age, http://www.privacyrights.org/fs/fs8a-hipaa.htm.

243. *See generally* Nicolas P. Terry, *What's Wrong With Health Privacy?*, 5 J. HEALTH & BIO. L. 1-32 (2009).

244. 45 C.F.R. §§ 164.500-534 (2009).

institutions.[245] Additionally, there have been strong critiques of the Office of Civil Rights in its approach to enforcing the regulations.[246] Some of the complaints about HIPAA's limitations should be addressed as a result of the Health Information Technology for Economic and Clinical Health Act, (HITECH), Subtitle D,[247] (part of the American Recovery and Reinvestment Act of 2009[248]). For example, "Business Associates" are no longer indirectly regulated through terms in their contracts with "Covered Entities" but are directly subject to the HIPAA code,[249] including its penalties.[250] HITECH seeks to respond to criticisms about HIPAA's lack of an educative goal, requiring regulations on educating health providers[251] and an initiative to "enhance public transparency regarding the uses of protected health information."[252] The legislation requires new regulations to strengthen the proportionality ("minimum necessary" under HIPAA) of disclosures[253] and strengthened restrictions on the use of protected health information for marketing purposes.[254] Enforcement should improve because of both tighter definitions of breaches of the code[255] and additional enforcement through state attorneys general.[256] Although there is still no private right of action, there will be a system designed to distribute a percentage of civil penalties or settlements collected from providers to injured patients.[257]

Notwithstanding the HIPAA approach to preemption, the HIPAA "floor," continues.[258] Further, the exact changes to the confidentiality code will depend on regulations made pursuant to the enabling legislation included in HITECH.

Although the HIPAA code and this forthcoming "version 2.0" are relevant

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245. *See, e.g., id.* §§ 164.508, 164.510, 164.512.

246. *See, e.g.*, Kirk J. Nahra, *The HIPAA Enforcement Era Begins!*, WILEY REIN LLP, Aug. 2008, *available at* http://www.wileyrein.com/publication_newsletters.cfm?id=10&publication_id=13717; Anne Zieger, *Why Toughen HIPAA When Nobody Enforces It?*, FIERCE HEALTHIT, Jan. 25, 2009, *available at* http://www.fiercehealthit.com/story/why-toughen-hipaa-when-nobody-enforces-it/2009-01-25.

247. Health Information Technology for Economic and Clinical Health Act, Pub. L. No. 111-5, §§ 13001-13424, 123 Stat. 226.

248. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 2 U.S.C., 5-8 U.S.C., 10 U.S.C., 12 U.S.C., 15-16 U.S.C., 18-20 U.S.C., 25-26 U.S.C., 29 U.S.C., 31 U.S.C., 32 U.S.C., 38 U.S.C., 40-42 U.S.C., 45-47 U.S.C., 49 U.S.C.).

249. *Id.* § 13401(a)-(b).

250. *Id.* § 13404(c).

251. *Id.* § 13403(a).

252. *Id.* § 13403(b).

253. *Id.* § 13405(b).

254. *Id.* § 13406(a).

255. *Id.* § 13409-10.

256. *Id.* § 13410(e).

257. *Id.* § 13410(c).

258. *Id.* § 13421.

to the regulation of the social network fact patterns discussed in this article, they are of less importance than in traditional, offline healthcare "boundary" scenarios. Running a Twitter feed from inside a hospital or physician blog posts that identify patients would seem to implicate HIPAA's "covered entity" requirements as far as confidentiality and consent. However, HIPAA still only applies to data entrusted to and subsequently disclosed by healthcare providers. Thus, patient health information that is posted to a social network site by someone other than a covered entity (e.g., by the patient) will not trigger HIPAA. Perhaps the most important limitation of HIPAA relevant to this Article is that the federal code does not create boundaries as to the collection of patient information (e.g., by insurers, employers or even physicians surfing patient profiles), but only its disclosure. As a result, most of the "boundary" analysis that follows will rotate around common law theories of liability.

III. SETTING BOUNDARIES FOR PHYSICIANS AND PATIENTS

Patients and their healthcare providers are robust users of global and enterprise wide networks. However, the two groups seldom intentionally interact using such tools,[259] notwithstanding governmental and healthcare institutions interest in promoting online interactions such as researching efficient healthcare interventions or sharing electronic medical records.[260] More than 61% of U.S. adults search for health information online.[261] Sustained growth in patient enthusiasm for online interactions notwithstanding,[262] many physicians still view direct contact with patients via email as time-consuming tasks best left to staff[263]

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259. *See* Nicolas P. Terry, *Prescriptions sans Frontières (or How I Stopped Worrying About Viagra on the Web but Grew Concerned About the Future of Healthcare Delivery)*, 4 YALE J. HEALTH POL'Y L. & ETHICS 183, 186 (2004) [hereinafter Terry, *Prescriptions sans Frontières*] (describing impact Internet has on doctor-patient relationship). *But see* Jaymes Song, *In Hawaii, the Doctor Is Always in-Online*, NEWSVINE, Jan. 15,· 2009, http://www.newsvine.com/_news/2009/01/15/2313309-in-hawaii-the-doctor-is-always-in-online (describing exceptions to the dearth of online physician-patient interactions).

260. *See, e.g.*, Nicolas P. Terry, *Personal Health Records: Directing More Costs and Risks to Consumers?*, 1 DREXEL L. REV. 216 (2009) (discussing growth of commercial personal health records models); Nicolas P. Terry & Leslie P. Francis, *Ensuring the Privacy and Confidentiality of Electronic Health Records*, 2007 U. ILL. L. REV. 681, 691-96 (discussing drivers behind move to electronic records); *see also* Nicolas P. Terry, *To HIPAA, A Son: Assessing The Technical, Conceptual, and Legal Frameworks for Patient Safety Information*, 12 WIDENER L. REV. 133 (2005).

261. Fox & Jones, *supra* note 63, at 2.

262. Paul Rosen & C. Kent Kwoh, *Patient-Physician E-mail: An Opportunity to Transform Pediatric Health Care Delivery*, 120 PEDIATRICS 701 (2007); Hardeep Singh et al., *Older Patients' Enthusiasm to Use Electronic Mail to Communicate With Their Physicians: Cross-Sectional Survey*, 11 J. MED. INTERNET RES. e.18 (2009), http://www.jmir.org/2009/2/e18.

263. Terry, *Prescriptions sans Frontières*, *supra* note 259, at 227.

or creating unacceptable time pressures during consultations.[264] The AMA remains concerned that email contact will damage the traditional framework of the physician-patient relationship.[265] Meanwhile regulators and prosecutors take the position that online practice encourages opportunistic online relationships designed to encourage the illegal distribution of prescription drugs.[266]

To this dystopian online world of physicians and patients now must be added category-blurring behavior by both cohorts: physicians intending to blog or tweet to other physicians but reaching a far broader audience; patients exposing medical or genetic signals in apparently private Facebook posts; physicians disclosing sufficient personal information on their profile pages to concern a patient or raise a red flag during a pre-employment background check; and physicians entering perhaps unintended relationships with a small number of the undifferentiated cohorts they meet online.

This section seeks to identify some of the "pinch points" that could lead to legal exposure for healthcare providers or an array of surprises for patients.

A. Physicians' Social Information Online

Search is omnipresent as both a personal and professional tool. We can Google our friends or colleagues and increasingly may view it as unprofessional to take a meeting with someone un-researched.

In fact, 35% of adults have used the Internet to search "for information about physicians or other health professionals."[267] A slightly smaller group (28%) searches for information about institutional providers.[268] There is a robust correlation between the adults that search for information online and those who use social network sites; some 39% of the former cohort use social network sites.[269] Emerging consumer-driven healthcare models suggest that patients should research their potential providers.

There are innumerable, searchable databases regarding regulatory proceedings or litigation with adverse results for physicians. These include The National Practitioner Data Bank,[270] the Federation Physician Data Center,[271] and

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264. Henry W.W. Potts & Jeremy C. Wyatt, *Survey of Doctors' Experience of Patients Using the Internet*, 4 J. MED. INTERNET RES. e5 (2002), http://www.jmir.org/2002/1/e5. *See also* Pauline W. Chen, *Medicine in the Age of Twitter*, N.Y. TIMES, June 11, 2009, http://www.nytimes.com/2009/06/11/health/11chen.html?_r=2; The Efficient MD—Life Hacks for Healthcare, http://efficientmd.blogspot.com/2008/04/ten-trends-in-american-medicine.html (Apr. 24, 2008, 12:22) (noting that the tenth top trend in healthcare is that Information Technology Will Fall Short of Promises).

265. AMA, CODE OF MEDICAL ETHICS § 5.026—The Use of Electronic Mail, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion5026.shtml.

266. *See* Terry, *Prescriptions sans Frontières*, *supra* note 259, at 199-202.

267. Fox & Jones, *supra* note 63, at 35.

268. *Id.* at 46.

269. *Id.* at 15.

270. Health Care Quality Improvement Act of 1986, Pub. L. No. 99-660, §§ 401-32, 100 Stat.

resources maintained by state medical boards.[272] But these databases are not always complete (although the reach of the NPDB may be expanding[273]) and seldom will document social behavior.

In 2008, Thompson and colleagues evaluated the Facebook profiles of University of Florida medical students and residents; 44.5% of medical students had a Facebook account, but only 37.5% of profiles were made private.[274] The study found that, "[u]se is more common among students, and most chose to keep their profiles open to the public."[275] The study found that many of these accounts included personal information "that is not usually disclosed in a doctor–patient relationship."[276] A random sub-sample of such studied sites disclosed; "content that could be interpreted negatively," such as excess alcohol consumption and foul language.[277]

As discussed below employers routinely search the social network sites of applicants and employees even though this practice is not without legal risk.[278] Such disincentives notwithstanding, in the wake of high-profile hiring scandals the case can be made that no hospital or system should make a professional appointment without first performing a detailed background check using all available search tools; including searches of social network sites. Recall, for example, the data available about some of the Florida medical students.[279] Further, a social network profile might contain postings, uploaded and tagged data, or membership in online groups that could signal anything from substance abuse to attitudes about race or gender.

In the healthcare domain this background-checking issue is of increasing importance because of the rise of so-called 'negligent credentialing' suits brought by a patient against a health care facility allegedly injured as a result of the acts or omissions of a facility-credentialed physician. In *Larson v. Wasemiller*,[280] the Minnesota Supreme Court noted:

> Given our previous recognition of a hospital's duty of care to protect its

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3743. *See generally* http://www.npdb-hipdb.hrsa.gov/.

271. FSMB, http://www.fsmb.org/m_fpdc.html (last visited Jan. 15, 2010).

272. *See, e.g.*, Virginia Board of Medicine Practitioner Information, http://www.vahealthprovider.com/ (last visited Jan. 15, 2010).

273. HHS NPRM, National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners: Reporting on Adverse and Negative Actions, 71 Fed. Reg. 14139-49 (Mar. 21, 2006).

274. Lindsay A. Thompson et al., *The Intersection of Online Social Networking with Medical Professionalism*, 23 J. GEN. INTERN. MED. 954, 954 (2008).

275. *Id.* at 956.

276. *Id.*; *see also* Jeff Cain, *Online Social Networking Issues Within Academia and Pharmacy Education*, 72 AM. J. PHARM. EDUC. 10 (2008).

277. Thompson et al., *supra* note 274, at 955-56.

278. *See infra* note 292 and accompanying text.

279. *See supra* notes 274-77 and accompanying text.

280. 738 N.W.2d 300 (Minn. 2007).

> patients from harm by third persons and of the analogous tort of negligent hiring, and given the general acceptance in the common law of the tort of negligent selection of an independent contractor, as recognized by the Restatement of Torts, we conclude that the tort of negligent credentialing is inherent in and the natural extension of well-established common law rights.[281]

The *Larson* court's 2007 opinion identified twenty-seven states that have recognized some form of the cause of action,[282] notwithstanding the difficult causation issues such suits pose.[283]

Although *Larson* recognized an action by the patient against the credentialing hospital, an important, additional legal implication was discussed in *Kadlec Medical Center v. Lakeview Anesthesia Associates*.[284] A patient in the plaintiff's medical center emerged from routine tubal ligation surgery in a permanent vegetative state.[285] The medical center settled a claim based on its respondeat *superior* for the alleged negligence of a drug-addicted anesthesiologist.[286] The medical center and its malpractice carrier then filed suit against the medical group where the anesthesiologist had previously practiced and the hospital where he worked and whose employees had discovered his drug abuse.[287] The group had terminated the anesthesiologist for drug abuse but had not reported him to the state medical board or NPDB.[288] Sixty-eight days after that termination members of the anesthesiology group submitted referral letters to a locum service that praised and recommended the physician yet failed to mention his drug abuse or that he had been terminated with a letter that included the phrase "[y]our impaired condition . . . puts our patients at significant risk."[289] The plaintiff medical center's detailed credentialing request to the hospital where the anesthesiologist had previously been credentialed was replied to with a brief and neutral statement of the dates of his prior employment.[290] At trial, the jury found for the plaintiff medical center on claims of intentional and negligent misrepresentation, and awarded $8.24 million (the settlement and attorney's fees in the original case).[291]

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281. *Id.* at 306.

282. *Id.* at 306-07; *see also* Harrison v. Binnion, 214 P.3d 631, 635 (Idaho 2009) (holding peer review immunity statute does not create immunity for negligent credentialing); Frigo v. Silver Cross Hosp. & Med. Ctr., 876 N.E.2d 697 (Ill. App. Ct. 2007).

283. *See, e.g.*, Davis v. St. Francis Hosp., No. 00C-06-045-JRJ, 2002 Del. Super. LEXIS 272, at *9-10 (Del. Super. Ct. Oct. 17, 2002).

284. 527 F.3d 412 (5th Cir.), *cert. denied*, 129 S. Ct. 631 (2008).

285. *Id.* at 417.

286. *Id.*

287. *Id.* at 417-18.

288. *Id.* at 416.

289. *Id.* at 415.

290. *Id.* at 416.

291. *Id.* at 418.

On appeal the Fifth Circuit reversed the verdict against the hospital on the basis that under Louisiana law these facts did not give rise to an affirmative duty to disclose;[292] a decision that may have been somewhat generous to the hospital and that may not be replicated in other jurisdictions. However, the court did affirm the judgment against the medical reference letter writers for affirmative misrepresentation, noting that "[t]hese letters are false on their face and materially misleading."[293]

Healthcare institutions making credentialing or hiring decisions currently face a dilemma when it comes to information about physicians contained in social network profiles. Although there may be some risks in searching against them (as discussed in the next section), the potential liability for making a personnel decision in the absence of such information likely tips the balance.

B. Patients' Health-Related Information Online

Health-related information posted online *by patients* might include open references to medical conditions or risk-taking (e.g., photographs of alcohol or drug abuse) or quite explicit signals of risky behaviors (e.g., membership of the Facebook page "I do really stupid stuff when I'm Drunk"[294]). Other signals may be more nuanced (e.g., membership of the Facebook fan page "A Glass of Wine Solves Everything"[295]). Equally, membership in some social groups related to health conditions, although a relatively small number of persons join such groups,[296] may operate as implicit signals regarding personal or family health (e.g., membership of Facebook group pages relating to Cancer Survivors,[297] Chronic Fatigue Syndrome,[298] or Autism Awareness[299]). Social network discussions by sufferers and survivors are frequently cited as an emergent area of powerful patient self-help.[300] But all such information may be of interest to

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292. *Id.* at 422 ("The defendants did not have a fiduciary or contractual duty to disclose what it knew to [plaintiff]. And although the defendants might have had an ethical obligation to disclose their knowledge of [the anesthesiologist's] drug problems, they were also rightly concerned about a possible defamation claim if they communicated negative information about [him].").

293. *Id.* at 419.

294. I Do Really Stupid Stuff When I'm Drunk, http://www.facebook.com/group.php?gid=222270916 (last visited Feb. 12, 2010).

295. A Glass of Wine Solves Everything, http://www.facebook.com/home.php#/group.php?gid=2390228727 (last visited Jan. 15, 2010).

296. Fox, & Jones, *supra* note 63, at 17 (Only 6% of the cohort that looks for health information online "have started or joined a health-related group on a social networking site.").

297. Cancer Survivors, http://www.facebook.com/home.php#/group.php?gid=2214852731 (last visited Jan. 15, 2010).

298. Chronic Fatigue Syndrome or Myalgic Encephalomyelitis, http://www.facebook.com/group.php?gid=65675018622 (last visited Jan. 15, 2010).

299. Autism Awareness, http://www.facebook.com/home.php#/group.php?gid=2207942310 (last visited Jan. 15, 2010).

300. *See, e.g.*, Zachary A. Goldfarb, *Seeking a Cure, Patients Find a Dose of Conversation*

employers or health insurers, and hopefully with more beneficence, physicians who search against their profiles.

1. Employers and Insurers.—Published surveys in the general employment world suggest that somewhere from one-quarter[301] to one-half of employers search the social network sites of potential employees.[302] Surveyed employers took particular note of suggestions of alcohol or drug use, inappropriate photos or other posted information, and "unprofessional" screen names.[303] Of course, sometimes, employee misconduct hardly needs any searching. The viral nature of data posted on social network sites is immense. But a video made by two pizza chain employees violating various health codes attracted one million views on YouTube and resulted in felony charges for the employees.[304]

Employer scrutiny of social network profiles implicates some legal risk when information discovered therein migrates into employment decisions.[305] For example, under federal law there is the potential for a discrimination action if a candidate was not hired because of religious belief or a disability revealed or suggested on a social network site.[306] Some state laws prohibit a broader list of discriminations (e.g., sexual orientation in California[307]). Going further, some state laws apply privacy and non-discrimination principles to private activities by employees.[308]

Online, WASH. POST, July 21, 2008, at D01.

301. Heather Havenstein, *One in Five Employers Uses Social Networks in Hiring Process*, COMPUTERWORLD, Sept. 12, 2008, http://www.computerworld.com/s/article/9114560/one_in_five_employers_uses_social_networks_in_hiring_process (22%); *see also* Wei Du, *Job Candidates Getting Tripped Up by Facebook*, Aug. 14, 2007, http://www.msnbc.msn.com/id/20202935/; Melissa Newton, *Employers Use MySpace, Facebook to Screen Applicants*, NBC DFW, Nov. 19, 2008, http://www.nbcdfw.com/news/business/Employers-Use-MySpace-Facebook-to-Screen-Applicants.html.

302. Adam Lisberg, *Employers May Be Searching Applicants' Facebook Profiles, Experts Warn*, DAILY NEWS (New York City), Mar. 10, 2008, http://www.nydailynews.com/money/2008/03/10/2008-03-10_employers_may_be_searching_applicants_fa.html (noting that 44% of employers searched profiles of job candidates on social networking sites; 39% searched a current employee's Facebook or MySpace pages).

303. Havenstein, *supra* note 301.

304. Stephanie Clifford, *Video Prank at Domino's Taints Brand*, N.Y. TIMES, Apr. 15, 2009, http://www.nytimes.com/2009/04/16/business/media/16dominos.html.

305. *See generally* Tari D. Williams & Abigail Lounsbury Morrow, *Want to Know Your Employees Better? Log on to a Social Network: But, Be Warned, You May Not Like What You See*, 69 ALA. LAW. 131, 132 (2008) (describing an employer's exposure to liability through use of social networking sites).

306. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. 12101 (2006).

307. CAL. GOV'T CODE § 12940(a) (West 2005 & Supp. 2006).

308. *See, e.g.*, CAL. LAB. CODE § 96(k) (West Supp. 2010); COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2008) ("It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful

Information posted in the pseudo-secluded world of a social network site could signal certain genetic information.[309] This issue is clearly on the radar of the Equal Employment Opportunity Commission (EEOC) as evidenced by a recent Notice of Proposed Rulemaking (NPRM) issued under the Genetic Information Nondiscrimination Act of 2008 (GINA).[310]

GINA, signed into law in May 2008, broadly prohibits discrimination by employers and health insurers based upon genetic information. One of GINA's key provisions is to characterize an "employer,"[311] "employment agency,"[312] "labor organization,"[313] or "labor-management committee controlling apprenticeship or other training or retraining"[314] that "request[s], require[s], or purchase[s] genetic information with respect to an employee or a family member of the employee" as having engaged in an "unlawful employment practice."[315] GINA offers several safe harbors including "where an employer purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history."[316] In the EEOC's 2009 NPRM under GINA this exception is expanded to include "electronic media, such as information communicated through television, movies, or the Internet, except that a covered entity may not research medical databases or court records, even where such databases may be publicly and commercially available, for the purpose of obtaining genetic information about an individual."[317] In its commentary, EEOC invited "public comment on whether there are sources similar in kind to those identified in the statute that may contain family medical history and should be included either in the group of excepted sources or the group of prohibited sources, such as personal Web sites, or social networking sites."[318] An EEOC decision to take the latter approach and to wall-off genetically-related social network data from employer or insurer use would signal the first use of an inalienability rule in the social network regulatory space.

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activity off the premises of the employer during nonworking hours . . . .").

309. For example, membership on a certain Facebook page might signal about family concerns regarding Type I diabetes (juvenile diabetes). *See* Find a Cure for Juvenile Diabetes, facebook.com/group.php?gid=2204811909 (last visited Feb. 12, 2010).

310. Notice of Proposed Rule-Making, Regulations Under the Genetic Information Nondiscrimination Act of 2008, 74 Fed. Reg. 9056-01 (Mar. 2, 2009) (to be codified at 29 C.F.R. pt. 1635); Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881.

311. *Id.* § 202(b).

312. *Id.* § 203(b).

313. *Id.* § 204(b).

314. *Id.* § 205(a).

315. *Id.* §§ 205(a), 205(b).

316. *Id.* §§ 202(b)(4), 203(b)(4), 204(b)(4), 205(b)(4).

317. Notice of Proposed Rule-Making, Regulations Under the Genetic Information Nondiscrimination Act of 2008, 74 Fed. Reg. 9056-01 (Mar. 2, 2009) (to be codified at 29 C.F.R. pt. 1635).

318. *Id.* at 9063.

In the meantime employers and insurers likely will argue that the law of boundaries has little relevance to their activities. First, the intrusion tort would not apply to a non-corporeal (or informational) seclusion. Second, any publicity action should fail because the information searched is not "private" as it has been disclosed to the social network user's "friends," although the use of the discovered information does not satisfy the "publicity" requirement; the broadcast "public" channel property is inapplicable and because the information is only used "internally," plaintiff cannot meet the numerical touchstone required for "private" channel cases.

The decisional law suggests some validity regarding the second of these publicity arguments, at least in most cases of minimal distribution. Notwithstanding and as argued below, the information should be viewed as "private" when the user has applied privacy and security settings.

However, employers and insurers should be less sanguine about the inapplicability of the seclusion tort. Case law already recognizes areas of seclusion in otherwise public areas;[319] the question that is open is whether an application of security and privacy settings will be the touchstone for delineating a secluded space. The non-corporeal argument is more difficult. To an extent the courts will face a core entitlement question; whether to consign to history the trespass-like roots of the intrusion tort and apply it more liberally to informational privacy. If they take this latter, less existential, approach the appropriate doctrinal solution will be to pivot the tort around the offensiveness of the intrusion rather than the locus of the seclusion.[320]

2. Physician Use of Posted Social Information.—Employers and health insurers may have understandable business reasons for searching online profiles. But should physicians research their patients? And what should be done with such information diagnostically?

Of course, not all patient-posted information allows for identification of specific patients. As such, aggregated discussions by de-identified patients provides an educational opportunity for physicians who wish to learn more about generalized care models and patient perceptions and experiences associated with particular illnesses or diseases.[321]

However, Moreno and colleagues examined the profile pages of self-described sixteen- and seventeen-year-olds in the "class of 2008" MySpace group, and found that most were identifiable by name, photograph, location and that "[n]early half of the adolescents . . . publicly disclosed sexual activity, alcohol use, tobacco use, or drug use."[322] A similar study of sixteen- to eighteen-year-olds across several social network sites by Williams and colleagues found

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319. *See supra* note 105 and accompanying text.

320. *See supra* note 103 and accompanying text.

321. Salil A. Mehta, *What Can Physicians Learn from the Blogs of Patients with Uveitis?*, 15 OCULAR IMMUNOLOGY AT INFLAMMATION 421, 423 (2007).

322. Megan A. Moreno et al., *What Are Adolescents Showing the World About Their Health Risk Behaviors on MySpace?*, MEDSCAPE GEN. MED. (2007), *available at* http://medscape.com/viewarticle/563320.

"84% of profiles and blog discussions containing some type of risk-taking behaviors," with nearly 50% of the participants at some risk of specific identification.[323]

The availability of this type of patient-specific information creates a classic emerging technology problem for physicians. May they ethically and legally access such information and, if they do, will they create a standard of care requiring scrutiny of such online data? The first question is easier to answer; general ethical standards suggest that physicians ask their patients' permission to access such information, even if it is publicly available. This stance dovetails with good risk management in that obtaining not just consent but informed consent regarding the access and use of such data will reduce the likelihood of either intrusion or malpractice actions. The second question, going to the standard of care, is more difficult to answer. At the very least professional specialty organizations (e.g., the American Psychiatric Association) should consider developing clinical practice guidelines on the subject with a view to preempting the indeterminacy of case-by-case development of the standard of care.

3. Third Parties Posting Patient Information.—Physicians will seldom be the direct source for patient-related health information that finds its way onto a social network site. Patients themselves, or their "friends" will have posted most such data. Some information may be sourced from providers (itself potentially implicating breach of confidence or HIPAA) but posted by meddlesome third parties.[324] Here, publicity and breach of confidence actions still may be applicable. The controversies in the recent Minnesota case of *Yath v. Fairview Clinics*,[325] began with a patient visit to a hospital clinic for STD testing. An acquaintance related to the patient's husband worked at the clinic as a medical assistant.[326] She recognized the patient and subsequently accessed her electronic medical record.[327] There she discovered that the patient tested positive for a STD and the fact that the patient had a new sexual partner.[328] The medical assistant passed on the information to another employee and the information eventually

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323. Amanda L. Williams & Michael J. Merten, *A Review of Online Social Networking Profiles by Adolescents: Implications for Future Research and Intervention*, 43 ADOLESCENCE 253, 264 (2008).

324. *See, e.g.*, Meade v. Orthopedic Assocs. of Windham County, No. CV064005043, 2007 Conn. LEXIS 3424, at *7 (Conn. Super. Dec. 27, 2007), 2007 Conn. Super. LEXIS 3424 (holding when employee acquired and distributed patient records but action was only filed against health facility that "[a] cause of action for invasion of privacy will not lie where the defendant did not directly publicize the private facts about the plaintiff even though 'publicity was a natural and foreseeable consequence' of the defendant's actions"). Of course the institution may be responsible vicariously in some circumstances and might still face HIPAA liability.

325. 767 N.W.2d 34, 58 (Minn. Ct. App. 2009).

326. *Id.* at 38.

327. *Id.*

328. *Id.*

became known to the patient's estranged husband.[329] After an investigation the medical assistant was terminated by the hospital.[330] Shortly thereafter a MySpace page was created containing information from the patient's medical record.[331] The page was online for approximately twenty-four hours and likely was viewed by only six people.[332] The patient brought action against most of the actors and the hospital on several theories including public disclosure of private facts and the private right of action provided by Minnesota's Health Records Act.[333] The trial court granted the defendants' motions for summary judgment.[334]

On appeal the court remanded the issue of the statutory private right of action asserted by the patient against the hospital and the medical assistant to the trial court, but not before ruling that such a state private right of action was not preempted by the federal HIPAA code.[335] Instead, ruling that the provisions were complementary: "[r]ather than creating an 'obstacle' to HIPAA, Minnesota statutes section 144.335 supports at least one of HIPAA's goals by establishing another disincentive to wrongfully disclose a patient's health care record."[336] A similar analysis should apply to a common law action for breach of confidence by a healthcare provider.

The *Yath* court affirmed the summary judgment on the public disclosure count on the basis that the likely authors of the MySpace page had been dismissed from the action.[337] Notwithstanding, the court exhaustively examined the defendant's other contention that the "publicity" requirement[338] was not satisfied by posting to a social network site that was only available for a short time and viewed by a small number of people.[339] The court referenced a controlling Minnesota analysis of RESTATEMENT (SECOND) OF TORTS section 652D[340] establishing the "publicity" element was satisfied by proving either, "a single communication to the public," *or* "communication to individuals in such a large number that the information is deemed to have been communicated to the public."[341] The court viewed posting to a social network site as an example of the former type of public communication because "[t]his Internet communication is materially similar in nature to a newspaper publication or a radio broadcast

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329. *Id.*

330. *Id.* at 39.

331. *Id.*

332. *Id.* at 39, 43.

333. *Id.* at 39. MINN. STAT. ANN. § 144.335 (West 2005) governed the case but has been replaced by MINN. STAT. ANN. § 144.298 (West Supp. 2010).

334. *Yath*, 767 N.W.2d at 40.

335. *Id.* at 50.

336. *Id.*

337. *Id.* at 45.

338. *See supra* text accompanying note 178.

339. *Yath*, 767 N.W.2d at 42-45.

340. *Id.* at 42.

341. *Id.*

because upon release it is available to the public at large."[342] Analogizing this brief web posting to "a late-night radio broadcast aired for a few seconds and potentially heard by a few hundred (or by no one)"[343] or "a poster displayed in a shop window,"[344] the court noted:

> It is true that mass communication is no longer limited to a tiny handful of commercial purveyors and that we live with much greater access to information than the era in which the tort of invasion of privacy developed. A town crier could reach dozens, a handbill hundreds, a newspaper or radio station tens of thousands, a television station millions, and now a publicly accessible webpage can present the story of someone's private life, in this case complete with a photograph and other identifying features, to more than one billion Internet surfers worldwide. This extraordinary advancement in communication argues for, not against, a holding that the MySpace posting constitutes publicity.[345]

The *Yath* court specifically noted that the MySpace profile in question was not one to which access had been restricted by "a password or some other restrictive safeguard."[346] Thus, it left hanging the same question as the one in *Moreno v. Hanford Sentinel, Inc.*,[347] where, as previously discussed, a college student's MySpace posting, critical of her hometown, found its way to the local newspaper.[348] If a social network site user applies security and privacy settings, would that render the site "secluded" for the purpose of initiating a breach of seclusion action or "private" for the purpose of resisting a publicity claim?

The most efficient approach for courts to adopt would be a bright line "posting" rule; that is, all posts, security or privacy settings notwithstanding, are public. Such an approach would avoid the inevitable and possibly interminable case-by-case debates whether "private" exposure of information to 10,100, or even 1000 friends would be akin to a public post.

However, that approach seems contrary to *Hill v. National Collegiate Athletic Ass'n*,[349] otherwise followed in *Moreno*. *Hill* upheld the NCAA's drug testing program in a suit brought by student athletes arguing violation of California's constitutional right to privacy.[350] Subsequently, it may be have been narrowed by the Supreme Court of California in *Sheehan v. San Francisco 49ers, Ltd.*,[351] a case dealing with security pat-downs at a football stadium. *Sheehan* re-

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342. *Id.* at 43.
343. *Id.* at 44.
344. *Id.* at 45.
345. *Id.* at 44.
346. *Id.*
347. 91 Cal. Rptr. 3d 858 (Ct. App. 2009).
348. *See supra* text accompanying note 147.
349. 865 P.2d 633 (1994).
350. *Id.* at 669.
351. 201 P.3d 472 (Cal. 2009).

emphasized *Hill*'s statement about context: "assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action."[352] *Sheehan* also stressed *Hill*'s observation that a plaintiff's privacy interests when bringing an action under California's constitutional privacy right "may weigh less in the balance"[353] if he or she "was able to choose freely among competing public or private entities in obtaining access to some opportunity, commodity, or service."[354]

Yet, in the context of the common law of boundaries, *Hill*'s words remain potent:

> Privacy rights also have psychological foundations emanating from personal needs to establish and maintain identity and self-esteem by controlling self-disclosure: "In a society in which multiple, often conflicting role performances are demanded of each individual, the original etymological meaning of the word 'person'—mask—has taken on new meaning. [People] fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy—to choose who shall see beneath the quotidian mask. Loss of control over which 'face' one puts on may result in literal loss of self-identity, and is humiliating beneath the gaze of those whose curiosity treats a human being as an object."[355]

The key privacy expectation acknowledged by the law of boundaries is this "right to *define* one's circle of intimacy."[356] As citizens spend more of their time in online environments and make responsible use of privacy and security settings to disaggregate those with whom they interact, so the law should respect their defined circles of intimacy.

C. Physicians and Patients as "Friends"

Suppose a physician "friends" a patient or vice versa. Does such blurring of personal and professional relationships create concern in either the legal or ethical domains? In the case of the former the primary question will be whether such a blurred, technologically mediated relationship could give rise to the legally significant physician-patient relationship.[357] In the ethical domain, the

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352. *Id.* at 479 (quoting *Hill*, 865 P.2d at 656).

353. *Id.* (quoting *Hill*, 865 P.2d at 657).

354. *Id.*

355. 865 P.2d at 647 (alteration in original) (citations omitted) (quoting Briscoe v. Reader's Digest Ass'n, Inc., 483 P.2d 34, 37 (Cal. 1971).

356. *See id.*

357. A related question is whether physician-patient contact through a social network could constitute the continuation of a relationship for the purposes of tolling a period of limitation. *See,*

question will come down to motive: is there a sense that the relationship is driven by the needs of the physician rather than the interests of the patient?

Again, context is important in unpacking the boundary issues. The appropriate question must be whether social or professional interests motivate the physician who follows a patient on Facebook or Twitter. If the motivation is social, then difficult boundary issues may arise. If professional (e.g., using social media to extend the treatment space), difficult risk management questions arise.

1. Creating a Physician-Patient Relationship.—Most of the scenarios discussed in this article assume the existence of a physician-patient relationship and then discuss how physician or patient online activities will play out against the healthcare regulatory matrix. Discussed, therefore, are scenarios such as physicians searching their patients' social network sites or micro-blogging about their treatment. Suppose, however, that there is no formed professional relationship at the point when a patient and a physician interact online. Could such interaction trigger the creation of a physician-patient relationship?

Such a relationship is both a conclusion and a term of art relied upon by the ethical and legal domains. As an ethical construct, it is the foundation of duties (and correlate expectations) of competence, respect, and confidence.[358] In the legal domain, the existence of a physician-patient relationship establishes the contractual responsibilities of the parties (such as the provision of services and the obligation to pay) and is the predicate for the finding of a legal duty; a requirement for tort recovery in the case of negligently provided care.[359]

These domain-specific questions engender the question: what does it take to create the physician-patient relationship? The doctrinal answer is that "the relationship is created when professional services are rendered and accepted for purposes of medical treatment."[360] The existence of a physician-patient relationship is usually a question of fact left to the jury.[361] In practice, therefore, the key issue is where the courts draw the summary judgment line.

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e.g., Weaver *ex rel.* Weaver v. Univ. of Mich. Bd. of Regents, 506 N.W.2d 264, 266 (Mich. Ct. App. 1993); Griffith v. Brant, 442 N.W.2d 652, 654 (Mich. Ct. App. 1989). *See generally* Jewson v. Mayo Clinic, 691 F.2d 405, 408-09 (8th Cir. 1982) (discussing what constitutes evidence of a continuing physician-patient relationship for the purposes of determining the statute of limitations period for medical malpractice actions).

358. *See, e.g.*, AMA, *Principles of Medical Ethics* (2001), http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.shtml.

359. *See, e.g.*, Sterling v. Johns Hopkins Hosp., 802 A.2d 440, 445 (Md. 2002); Kruger *ex rel.* Estate of Kruger v. Jennings, No. 227480, 2002 WL 344268, at *3 (Mich. Ct. App. Apr. 12, 2002), *superseded by* 2002 WL 652098; Pittman v. Upjohn Co., 890 S.W.2d 425, 431 (Tenn. 1994).

360. Miller v. Sullivan, 214 A.2d 822, 823 (N.Y. App. Div. 1995).

361. *See, e.g.*, Irvin *ex rel.* Irvin v. Smith, 31 P.3d 934, 940-41 (Kan. 2001); Lyons v. Grether, 239 S.E.2d 103, 105 (Va. 1977); Walker v. Jack Eckerd Corp., 434 S.E.2d 63, 69 (Ga. Ct. App. 1993); Cogswell *ex rel.* Cogswell v. Chapman, 249 A.D.2d 865, 866 (N.Y. App. Div. 1998); Bienz v. Cent. Suffolk Hosp., 163 A.D.2d 269, 270 (N.Y. App. Div. 1990) ("Whether the physician's giving of advice furnishes a sufficient basis upon which to conclude that an implied physician-patient relationship had arisen is ordinarily a question of fact for the jury.").

Because of the consensual nature of the physician-patient relationship, courts must determine in these cases whether the physician consented to treat the patient.[362] Such consent can be express, implied,[363] or derived from a duty owed by the physician to another.[364] In short, "whatever circumstances evince the physician's consent to act for the patient's medical benefit."[365] This approach explains most of the decisions related to the clusters of fact-patterns that are relatively mature. For example, how courts navigate the distinction between the informal (or "curbside") consult[366] and the formal (or "bedside") consult,[367] deal with the responsibilities of on-call but non-treating physicians,[368] and respond to cases where patients are examined by physicians employed by others such as employers or insurers.[369]

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362. "The physician may consent to the relationship by explicitly contracting with the patient, treating hospital, or treating physician. Or the physician may take certain actions that indicate knowing consent, such as examining, diagnosing, treating, or prescribing treatment for the patient." Lownsbury v. VanBuren, 762 N.E.2d 354, 362 (Ohio 2002).

363. *See, e.g.*, St. John v. Pope, 901 S.W.2d 420, 423 (Tex. 1995) (stating that a doctor-patient relationship can only be formed with the express or implied consent of physician).

364. *See* Bovara v. St. Francis Hosp., 700 N.E.2d 143, 146 (Ill. App. Ct. 1998) ("A consensual relationship can be found to exist . . . where a physician accepts a referral of a patient [from another physician]." (citations omitted)).

365. *Lownsbury*, 762 N.E.2d at 360.

366. *See, e.g.*, *Irvin*, 31 P.3d at 943 (holding that an "extension of the physician-patient relationship to include . . . [curbside] consultation would be contrary to public policy"); Oja v. Kin, 581 N.W.2d 739, 743 (Mich. Ct. App. 1998) (holding that "merely listening to another physician's description of a patient's problem and offering a professional opinion regarding the proper course of treatment is not enough [to form a patient-physician relationship]"); Corbet v. McKinney, 980 S.W.2d 166, 169 (Mo. Ct. App. 1998) (citing factors where a consulting physician may develop a patient-physician relationship with a patient whom the consulting physician has never met or spoken with). *Cf.* Gilinsky v. Indelicato, 894 F. Supp. 86 (E.D.N.Y. 1995) (determining if a patient-physician relationship exists between a patient and a consulting physician depends on whether the treating physician used independent judgment when accepting or rejecting advice of consulting physician); *Cogswell*, 249 A.D.2d at 866 (holding that a telephone call can create a patient-physician relationship if physician "affirmatively advises a prospective patient as to a course of treatment and it is foreseeable that the patient would rely on the advice" (quotations omitted)).

367. *See, e.g.*, Kelley v. Middle Tenn. Emergency Physicians, P.C., 133 S.W.3d 587, 595 (Tenn. 2004) (distinguishing on call physicians from those participating in informal physician to physician consults).

368. *See, e.g.*, Prosise v. Foster, 544 S.E.2d 331, 334 (Va. 2001) (holding that there was no patient-physician relationship because there was no evidence that physician agreed to take patient's case by agreeing to act as an on-call attending physician in a teaching hospital); Wazevich v. Tasse, No. 88938, 2007 Ohio App. LEXIS 4484, at *17 (Ohio Ct. App. Sept. 27, 2007) (finding that an on-call doctor and emergency room patient may develop a patient-physician relationship depending on the hospital's procedures and whether physician took affirmative action on behalf of the patient).

369. *See, e.g.*, Greenberg v. Perkins, 845 P.2d 530, 538 (Colo. 1993) (holding that an independent medical examiner had a duty of care to not cause examinee harm); Dyer v. Trachtman,

The cases dealing with technologically mediated, but not physical contact between physician and patient, are less transparent. It does seem clear that "a telephone call merely to schedule an appointment with a provider of medical services does not by itself establish a physician-patient relationship where the caller has no ongoing physician-patient relationship with the provider and does not seek or obtain medical advice during the conversation."[370] Similarly, merely scheduling a diagnostic test is likely insufficient.[371] As soon as there is engagement in the treatment process by the physician; however, the relationship may be held to exist.[372]

The case that is closest to a social network scenario is *Miller v. Sullivan*,[373] where a dentist telephoned a friend who was a physician between 9:30 a.m. to 10:00 a.m., and informed him that he believed he was having a heart attack.[374] The physician allegedly told the dentist "to come over and see him right away."[375] The dentist continued to see his own patients through the morning, however, and did not reach the physician's office until the early afternoon at which point he suffered a cardiac arrest.[376] The court upheld the defendant physician's summary judgment[377] by finding the physician owed the decedent no duty of care and therefore there was no breach of duty:

> Assuming that a physician renders professional service for purposes of medical treatment to a prospective patient who calls on the telephone when the physician tells the caller to come to his office right away, the record in this case conclusively establishes that decedent did not accept

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679 N.W.2d 311, 314 (Mich. 2004) (holding that "an [independent medical examination] physician has a limited physician-patient relationship with the examinee . . . [with] limited duties to exercise professional care"); Harris v. Kreutzer, 624 S.E.2d 24, 32 (Va. 2006) (holding that "physician's duty is limited solely to the exercise of due care . . . as not to cause harm to the patient in actual conduct of the examination"); Heller v. Peekskill Cmty. Hosp., 198 A.D.2d 265, 265-66 (N.Y. App. Div. 1993) (citing factors plaintiff must prove to establish that an examining doctor consented to a patient-physician relationship).

370. Weaver *ex rel.* Weaver v. Univ. of Mich. Bd. of Regents, 506 N.W.2d 264, 266 (Mich. App. Ct. 1993).

371. Jackson v. Isaac, 76 S.W.3d 177, 184 (Tex. App. 2002).

372. Bienz v. Cent. Suffolk Hosp., 163 A.D.2d 269, 269, 270 (N.Y. App. Div. 1990) (holding that a telephone conversation that includes recommendation for a course of treatment may give rise to physician-patient relationship); Lam v. Global Med. Sys., Inc., 111 P.3d 1258, 1261 (Wash. Ct. App. 2005) (holding that ship-to-shore radio communication was sufficient to create physician-patient relationship under the facts of the case); *see also* Cogswell *ex rel.* Cogswell v. Chapman, 249 A.D.2d 865, 866-67 (N.Y. App. Div. 1998) (holding that telephone consult may establish a physician-patient relationship depending on physician's level of participation in patient's care).

373. 214 A.D.2d 822 (N.Y. App. Div. 1995).

374. *Id.* at 822.

375. *Id.* at 823.

376. *Id.*

377. *Id.*

> the professional service. Instead, decedent chose to pursue an entirely different course of conduct than that recommended by defendant.[378]

In conflating the issues of duty and breach, the *Miller* court made it less than clear whether a physician-patient relationship existed on these facts. Arguably, the court held that there was no such relationship because (and this is a different approach from the cases discussed above) the *patient* failed to agree to the relationship by rejecting the physician's advice.[379]

Physicians seem to understand the perils of creating an unexpected, offline physician-patient relationship. They show caution in social interactions (e.g., at social gatherings, parties, etc.). This caution will need to be extended to online interactions.

In the absence of a pre-existing physician-patient relationship the blog scenario gives rise to issues that are similar to those encountered by physicians in navigating email questions about health; more specifically, responding to unsolicited email.[380] When a non-patient poses a health-related question to a physician, be it through an email, a blog, or a social network site, the physician has two core options; to ignore the question or to answer it. Ignoring such a communication is not without some risks, particularly if the putative patient describes an emergency situation.[381] Any kind of personalized response, let alone any type of diagnosis or treatment advice, however, would likely create a jury issue over the creation of a physician-patient relationship, even if disclaimers accompanied the communication.[382] Rather, the only legally sound approach is for the physician to respond to an electronic inquiry with a standard form response, that in no way refers to the specific sender or the sender's disclosed information, which (1) informs the questioner that the physician does not answer such online questions, (2) supplies the questioner with the physician's offline office information in case the questioner would like to make an appointment, and (3) provides contact information for the emergency services and suggest the questioner contacts same if he or she cannot wait for an appointment during regular business hours.

2. Risk-Managing a Blurred Relationship.—The correlate of this scenario

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378. *Id.*

379. *Id.*

380. *See generally* Gunther Eysenbach & Thomas L. Diepgen, *Responses to Unsolicited Patient E-mail Requests for Medical Advice on the World Wide Web*, 280 JAMA 1333, 1333 (1998).

381. *Cf.* Patricia C. Kuszler, *A Question of Duty: Common Law Legal Issues Resulting from Physician Response to Unsolicited Patient Email Inquiries*, J. MED. INTERNET RES. (2000), *available at* http://www.jmir.org.2000/3/e17; Mary V. Seeman & Bob Seeman, *E-psychiatry: The Patient-Psychiatrist Relationship in the Electronic Age*, 161 CAN. MED. ASS'N J. 1147 (1999), *available at* 1999 WLNR 189189 ("Clearly, the most judicious course of action is not to respond to email queries.").

382. *Cf.* Eric E. Shore, *Giving Advice on Social Networking Sites*, 85 MED. ECON. 18 (2008), *available at* 2008 WLNR 25457729.

also requires attention. If one assumes an existing physician-patient relationship and that the physician is utilizing social network tools to extend the treatment space, what are the liability risks? Regarding the use of email communication between patient and physician, the AMA stresses notification by the physician to the patient of the risks and limitations of such communication. These include, "potential breaches of privacy and confidentiality, difficulties in validating the identity of the parties, and delays in responses."[383] Any such communication should be preceded by informed consent regarding these risks.[384] Absent such setting of professional and technological expectations (and boundaries) liability risks may arise if a physician is not checking social network posts regularly (or regularly as the patient posts) and fails to see, say, a time-sensitive diagnostic signal.[385]

3. Appropriateness of "Friend" Relationships.—Suppose that there is an extant physician-patient and, hence professional relationship, but that a social or personal relationship subsequently develops through a social network intermediary. This phenomenon has received the most commentary regarding employment relationships in situations where employers seek to friend employees and exploit access to posted data such as opinions or photographs.[386]

At the extreme, social relationships between physicians and patients can involve sexual relationships.[387] The AMA characterizes "[s]exual contact that occurs concurrent with the patient-physician relationship" as "sexual misconduct."[388] Non-concurrent relationships may also be unethical "if the physician uses or exploits trust, knowledge, emotions, or influence derived from the previous professional relationship."[389] These concepts of trust, exploitation, and the primacy of patient well-being help to tease out the application of ethical principles to "friending" online.

Nadelson and Notman have helpfully explored these greyer areas of physician-patient relationships. They differentiate between "minor boundary *crossings*" that they do not regard as "exploitative" from those that they

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383. AMA, CODE OF MEDICAL ETHICS § 5.026(3)—The Use of Electronic Mail (2003), http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion5026.shtml.

384. *Id.* § 5.026(4).

385. *See generally* Chen, *supra* note 264.

386. *See, e.g.*, Michelle Wilding, *Is Your Boss Your Friend or Foe?*, SYDNEY MORNING HERALD, May 19, 2009, http://www.smh.com.au/news/technology/biztech/is-your-boss-your-friend-or-foe/2009/05/18/1242498695453.html?page=fullpage#contentSwap1.

387. *See generally* Paul S. Appelbaum et al., *Sexual Relationships Between Physicians and Patients*, 154 ARCH. INTERN. MED. 2561 (1994); Linda J. Demaine, *'Playing Doctor' with the Patient's Spouse: Alternative Conceptions of Health Professional Liability*, 14 VA. J. SOC. POL'Y & L. 308 (2007).

388. AMA, CODE OF MEDICAL ETHICS § 8.14—Sexual Misconduct in the Practice of Medicine (1992), http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion814.shtml.

389. *Id.*

categorize as "damaging boundary *violations*."[390] For the purposes of this Article, the vocabulary Nadelson and Notman use to frame the issues is on point here. In particular, they state:

> An essential element of the physician's role is the idea that what is best for the patient must be the physician's first priority. Physicians must set aside their own needs in the service of addressing their patient's needs. Relationships, such as business involvements, that coexist simultaneously with the doctor–patient relationship have the potential to undermine the physician's ability to focus primarily on the patients' well being, and can affect the physician's judgment.[391]

Some physicians argue that the use of social network tools to extend the physician-patient relationship allows the patient to see the "human side" of the physician.[392] However, as Nadelson and Notman observe, "at times self-disclosure may be excessive and create difficulties. The patient may react negatively and it may seem like a role reversal if the doctor begins to disclose personal problems to the patient," and can create a "boundary problem because it can use the patient to satisfy the doctor's own needs for comfort or sympathy."[393] Specific ethical guidelines consistent with this approach caution physicians regarding, for example, discussion of politics[394] or "derogatory language or actions."[395] In short, the physician must be protective of the patient's needs, and not his own.

D. Physicians "Tweeting" or Posting About Their Work

The modern Hippocratic Oath will include language such as "I will respect the hard-won scientific gains of those physicians in whose steps I walk, and

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390. Carol Nadelson & Malkah T. Notman, *Boundaries in the Doctor–Patient Relationship*, 23 J. THEORETICAL MED. 191, 192 (2002).

391. *Id.* at 195; *see also* AM. PSYCH. ASS'N, THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY 13 (2009), http://www.psych.org/MainMenu/PsychiatricPractice/Ethics/ResourcesStandards.aspx (follow "The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry" hyperlink) ("A psychiatrist shall not gratify his or her own needs by exploiting the patient.").

392. *See* Stacey Butterfield, *Twitter: A Medical Help, Hindrance or Hype?*, ACP INTERNIST, Apr. 2009, http://www.acpinternist.org/archives/2009/04/ twitter.htm; Carleen Hawn, *Take Two Aspirin and Tweet Me in the Morning: How Twitter, Facebook, and Other Social Media Are Reshaping Health Care*, 28 HEALTH AFFAIRS 361 (2009). *See generally* Chen, *supra* note 264.

393. Nadelson & Notman, *supra* note 390, at 197.

394. AMA CODE OF MEDICAL ETHICS § 9.012—Physicians' Political Communications with Patients and Their Families (1999), http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion9012.shtml.

395. AMA CODE OF MEDICAL ETHICS § 9.123—Disrespect and Derogatory Conduct in the Patient-Physician Relationship, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion9123.shtml.

gladly share such knowledge as is mine with those who are to follow."[396] The AMA Code of Medical Ethics includes in its description of the physician's role, "a teacher who imparts knowledge of skills and techniques to colleagues."[397] Not surprisingly physicians embrace new technologies to fulfill their educational responsibilities. However, posting or "tweeting" about their work is not without its risks.

1. Blogging and Posting.—According to 2008 research, 12% of Internet users (9% of all U.S. adults) "blog," while 33% of Internet users (24% of all adults) read blogs.[398] Kovic and colleagues estimated that there are over one thousand active English-language medical blogs, and found that these medical bloggers are highly educated and that many had previously published scientific papers.[399] Yet, only a relatively small number of participants in the medical blogosphere identified themselves as healthcare professionals.[400] Seeman[401] identified the six most highly used health-related blogs as BadScience.net (written by a U.K. physician who critiques media coverage of science),[402] Medgadget.com (written by MDs and biomedical engineers),[403] the journalist-run Wall Street Journal Health Blog,[404] SharpBrains (concentrating on "brain fitness" and "the cognitive health" market),[405] KevinMD.com (written by a New Hampshire-based primary care physician; its associated Twitter site, @kevinmd, has more than 20,703 "followers"),[406] and Diabetes Mine (a patient information and support blog).[407]

Lagu and colleagues examined 271 blogs written by healthcare providers and

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396. The Hippocractic Oath: Modern Version, http://www.pbs.org/wgbh/nova/doctors/oath_modern.html (last visited Jan. 15, 2010).

397. AMA CODE OF MEDICAL ETHICS § 9.08—New Medical Procedures, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion908.shtml (last visited Jan. 15, 2010).

398. Aaron Smith, *New Numbers for Blogging and Blog Readership*, PEW INTERNET & AM. LIFE PROJECT, July 22, 2008, http://www.pewinternet.org/Commentary/2008/July/New-numbers-for-blogging-and-blog-readership.aspx.

399. *Id.*

400. Ivor Kovic et al., *Examining the Medical Blogosphere: An Online Survey of Medical Bloggers*, 10 J. MED. INTERNET RES. e28 (2008), http://www.jmir.org/2008/3/e28/; *cf.* Deirdre Kennedy, *Doctor Blogs Raise Concerns About Patient Privacy* (Nat'l Pub. Radio broadcast Mar. 13, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=88163567 (noting 120,000 medical blogs).

401. Neil Seeman, *Inside the Health Blogosphere: Quality, Governance and the New Innovation Leaders*, 7 ELECTRONICHEALTHCARE 101 (2008).

402. Bad Science, http://badscience.net/ (last visited Jan. 15, 2010).

403. Medgadget, http://medgadget.com/ (last visited Jan. 15, 2010).

404. Health Blog, http://blogs.wsj.com/health/ (last visited Jan. 15, 2010).

405. SharpBrains, http://www.sharpbrains.com/blog/ (last visited Jan. 15, 2010).

406. Kevin MD.com Medical Weblog, http://www.kevinmd.com/blog/ (last visited Apr. 1, 2010).

407. Diabetes Mine, http://www.diabetesmine.com/ (last visited Jan. 15, 2010).

found that 42.1% described interactions with individual patients and 16.6% included information detailed enough that patients could identify the provider or themselves.[408] Eight blogs included imaging related to patients and three blogs even showed identifiable photographs.[409] Patients were portrayed negatively in 17.7% of blogs; negative comments about the healthcare system appeared in 31.7% of blogs.[410]

Certain types of blog posts, each with different levels of attendant risk, can be identified.[411] The first, which will pose few legal risks, may be thought of as "peer blogging," where healthcare providers seek to reach out to their colleagues much as they do in offline channels such as medical journals or even professional conferences, discussing new treatments, drugs, or technologies.

The second is the "ranting" blog post, where physicians might vent about salaries, low health care reimbursement rates, long working hours, and other issues that frustrate them.[412] Such posts could generate unwelcome attention from peers, institutional providers, or medical boards. Suppose, for example, that a physician posted, "I had a case today dealing with a patient previously seen by Dr. Smith; I spent the best part of the day putting right what he did wrong!" Such a communication is likely to get the attention of the peer who could sue for defamation.[413] It might also attract scrutiny from professional organizations or

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408. Tara Lagu et al., *Content of Weblogs Written by Health Professionals*, 23 J. GEN. INTERN. MED. 1642-46 (2008).

409. *Id.*

410. *Id.*

411. *See generally* Julia M. Johnson, *Web Risk: Blogging Can Be a Medically Useful Tool for Doctors; but Details Could Doom Your Career*, MO. MED. L. REP., June 2008 (interview with Nicolas Terry); Kennedy, *supra* note 400.

412. *See* Scott R. Grubman, Note, *Think Twice Before You Type: Blogging Your Way To Unemployment*, 42 GA. L. REV. 615 (2008); *see also* David Kravets, *AP Reporter Reprimanded For Facebook Post; Union Protests*, WIRED, June 9, 2009, *available at* http://wired.com/threatlevel/2009/06/facebooksword (discussing various adverse employment disciplinary actions brought by employers against Facebook-posting employees).

413.

> In a suit for defamation, a private plaintiff must allege (1) publication of false statements about the plaintiff that "expose [] [him] to distrust, hatred, contempt, ridicule or obloquy or which cause [him] to be avoided, or which [have] a tendency to injure [him] in his office, occupation, business or employment."

Saadi v. Maroun, No. 8:07-cv-1976-T-24-MAP, 2009 U.S. Dist. LEXIS 42574, *10 (M.D. Fla. May 20, 2009) (quoting Cooper v. Miami Herald, 31 So. 2d 382, 384 (Fla. 1947)). The plaintiff must also allege that the publication was "(2) done without reasonable care as to the truth or falsity of those statements; and (3) that result in damage to that person." *Id.* (citing Hay v. Indep. Newspapers, Inc., 450 So. 2d 293, 294-95 (Fla. Dist. Ct. App. 1984)). In *Saadi*, the court found that the defendant's allegations, published on a blog that the plaintiff was an unemployed lawyer and that his car was purchased with stolen money, to be triable whether they satisfy elements these three of a defamation suit. *Id.* at *11-12. The court further found that even though the blog was political in tone, there was a sufficient mix of fact and opinion as to be reasonably construed as

medical boards for unethical conduct,[414] and could violate the terms of a contract with an employing or credentialing healthcare institution.

The highest level of risk is associated with a blog posting that involves the risk of a patient being identified. Here, both the breach of confidence tort and HIPAA may be implicated. Physicians may use pseudo anonymous terms to describe the cases they reference in an attempt to reduce the possibility of positively identifying any patient in a blog discussion. Notwithstanding such efforts, re-identification may be possible from detailed demographics, location, as well as symptoms. Discussing general breaches of confidentiality, Brann and Mattson note, "[u]nintentional confidentiality breaches have been overheard in elevators, cafeterias, hallways, doctors' offices, and hospital rooms and at cocktail parties."[415] The authors' typology of breaches included disclosures by healthcare providers to their own family members[416] and to their friends.[417] As they describe in the latter context (which is analogous to social network posts),

> [i]n providing confidential information to friends, health care providers run an even greater risk of harming patients. This is because they may not be as aware of their friends' extended network of relationships as they are of their family's. Consequently, they may have even less control over who else might become privy to the confidential information.[418]

2. Twitter Feeds and Status Updates.—In February 2009, a surgeon at Henry Ford Hospital in Detroit provided a real-time Twitter feed during his performance of a robotic partial nephrectomy on a patient.[419] This was not a rogue surgeon indulging a personal interest. Dr. Craig Rogers is a well-known urologist and the feed, written by his chief resident, was publicized in advance

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defamation. *Id.* at *14. In the example cited, the fact that the discussion would likely be predicated on an actual patient or health problem would make it easier for courts to find defamatory statements when mixed with opinion. Note also that First Amendment protection for derogatory blog posts is limited. *See, e.g.*, Richerson v. Beckon, 337 F. App'x 637 (9th Cir. 2009) (defense summary judgment upheld in § 1983 action by teacher against supervisor who was transferred after making comments on her personal blog), *amended by* 08-35310, 2009 U.S. App. LEXIS 19327 (Aug. 27, 2009).

414. *See, e.g.*, AMA CODE OF MEDICAL ETHICS § 9.031—Reporting Impaired, Incompetent, or Unethical Colleagues, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion9031.shtml (specifying how such issues should be dealt with).

415. Maria Brann & Marifran Mattson, *Toward a Typology of Confidentiality Breaches in Health Care Communication: An Ethic of Care Analysis of Provider Practices and Patient Perceptions*, 16 HEALTH COMM. 231, 233 (2004) (citations omitted).

416. *Id.* at 244-45.

417. *Id.* at 245.

418. *Id.*

419. Elizabeth Cohen, *Surgeons send 'Tweets' from Operating Room*, CNN.COM, Feb. 17, 2009, http://www.cnn.com/2009/TECH/02/17/twitter.surgery/index.html.

by his hospital system.[420] The avowed purpose of the feed was "to get the word out" about less invasive surgical techniques.[421]

As previously noted, the AMA Code of Ethics mandates that either contemporaneous or recorded observations of physician-patient interactions must be preceded by explicit agreement and comprehensive informed consent. Separate consents are required both for the original recording and any subsequent broadcast. The consent must state that patient's decision will not affect the medical care he or she receives.[422]

These general rules are reinforced by various ethics opinions from specialty organizations.[423] For example, in answer to the question, "May I use a videotape segment of a therapy session at a work-shop for professionals?" the American Psychiatric Association listed the following preconditions:

1. The patient gives fully informed, uncoerced consent that is not obtained by an exploitation related to the treatment.
2. The proposed uses and potential audience are known to the patient.
3. No identifying information about the patient or others mentioned will be included.
4. The audience is advised of the editing that makes this less than a complete portrayal of the therapeutic encounter.[424]

The common law privacy rules are consistent. Recall *Vassiliades v. Garfinckel's, Brooks Brothers*, where a physician published before and after photographs of his patient via a television commercial.[425] The court found "[t]he nature of the publicity ensured that it would reach the public."[426] It seems reasonably clear that public Twitter feeds or unsecured Facebook pages will satisfy the courts' emerging approach to "public" disclosure as discussed in *Yath*.[427] As evidenced by the increased use of such feeds by public entities (such as police departments), this is a broadcast medium designed to reach the public.[428]

The specific difficulty faced by physicians using social network real-time broadcast technologies such as Twitter feeds or Facebook status updates is how

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420. *Live Surgery on Twitter, Please Join Physicians from Henry Ford for Our Next Live Twitter Surgery Event on February 9th*, http://www.henryford.com/body.cfm?id=51168 (last visited Jan. 15, 2010).

421. Cohen, *supra* note 419.

422. *See supra* text accompanying note 230.

423. *See, e.g.*, AM. PSYCH. ASS'N, *supra* note 391, at 24.

424. *Id.*

425. *See supra* text accompanying note 179.

426. Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 588 (D.C. 1985).

427. *See supra* text accompanying note 325.

428. *See, e.g.*, Lisa Respers France, *Police Departments Keeping Public Informed on Twitter*, CNN.COM, Mar. 13, 2009. http://www.cnn.com/2009/TECH/03/13/police.social.networking/index.html; Jasmine Huda. *Law Enforcement Turns to Twitter*, KSDK.COM, June 19, 2009, http://www.ksdk.com/news/local/story.aspx?storyid=178164.

to satisfy the ethical and legal requirements of consent. Informed consent does not scale well and application of consent requirements analogous to filming or broadcasting patient treatments include quite specific (and close to impossible) requirements of the disclosure of the audience that will see the broadcast. Arguments that the patient was anonymous (or, in HIPAA terms, that the patient information was de-identified) may not be sustainable given the likelihood that some in a public audience would be able to deduce the identity of the patient.

One blogger has published "140 Health Care Uses for Twitter"[429] and, perhaps, physicians pushing status updates from an emergency room honestly believe that they are educating others about the practice of medicine. However, if either the tweeting or the blogging is about patients, the admonition from Nadelson and Notman requires reiteration; "what is best for the patient must be the physician's first priority."[430]

CONCLUSION

The issues examined in this article are about context. For many readers there may be no issue deserving of legal resolution—merely bemusement that anyone would act online in a manner analogous to wearing a t-shirt proclaiming "I Like Weed" or "If You Can Read This, I've Been Paroled" to a job interview. Similarly, it may be argued that the legal system should not rescue those with bad judgment or concern itself with risky behavior that is exposed to all by users who fail to make appropriate use of available privacy or security settings. As more people lose their jobs or their health insurance because of what they post online perhaps more users will employ these settings to disaggregate their "friends" or otherwise modulate their online behavior. Equally, healthcare institutions, teaching hospitals, and physician organizations are likely to make their views about the online behavior of their physicians far more pointed and embed them in normative form. From there such norms are likely to migrate to our legal and regulatory systems.

The soft (even soft law) answers to many of the issues discussed in this article are, first, to increasingly incorporate the issues raised into professional training and institutional risk management strategies. Second, observe as press and public opinion (combined with nudges from regulatory agencies such as the FTC) force social network sites to increase the number and transparency of protective online tools they make available to users. However, changes to their architectures, such that robust privacy and security settings become the default, challenge aspects of the services' business models and likely will not occur soon, or willingly. Third, whatever the EEOC ends up proposing with regard to social network data and GINA, we are likely to see legislatures or regulatory agencies fashion some bright lines as to when posted data can or cannot be used in some contexts or by some persons.

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429. Phil Baumann, http://philbaumann.com/2009/01/16/140-health-care-uses-for-twitter/ (Jan. 16, 2009, 14:21).

430. *See supra* text accompanying note 391.

Beyond and, perhaps, before such amelioratory strategies, the common law of boundaries must step up and protect responsible users online. True to its context-based framework the law of boundaries should recognize private or secluded areas that have been established by users of social network sites.

VOTER DECEPTION

GILDA R. DANIELS*

ABSTRACT

In our recent electoral history, deceptive practices have been utilized to suppress votes in an attempt to affect election results. In most major elections, citizens endure warnings of arrest, deportation, and even violence if they attempt to vote. In many instances, these warnings are part of a larger scheme to suppress particular voters, whom I call "unwanted voters," from exercising the franchise. Recent advancements in technology provide additional opportunities for persons to deceive voters, such as calls alerting citizens that Republicans (Whites) vote on Tuesday and Democrats vote (Blacks) on Wednesday.

In spite of this resurgence of deception, the statutes that are available for enforcement have in many instances remained dormant. Even worse, they are sometimes used against the very community that they were originally written to protect. This dormancy has revealed a need for clarity. This article exposes the deficiencies in the current state of the law governing voter intimidation and deceptive practices. Moreover, it attempts to correct those deficiencies within the confines of the Constitutional framework.

INTRODUCTION

Because [of] the confusion caused by unexpected heavy voter registration, voters are asked to apply to the following schedule:
Republican *voters are asked to vote at your assigned location on* ***Tuesday****.*
Democratic *voters are asked to vote at your assigned location on* ***Wednesday****.*
Thank you for your cooperation, and remember voting is a privilege.

—Franklin County, Where Government Works[1]

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* Assistant Professor, University of Baltimore School of Law. I would like to thank the faculty at the University of Baltimore School of Law, the Southeastern Association of Law Schools (SEALS) New Scholars Workshop, and particularly Professor William Funk from Lewis & Clark Law School, who mentored me through the SEALS process; the Mid-Atlantic People of Color Legal Scholarship Conference, Professors Henry Chambers from Richmond School of Law; Cassandra Jones Harvard, University of Baltimore School of Law; and Muriel Morisey, Temple University Beasley School of Law, for their helpful comments. Special thanks to the *Indiana Law Review* for their patience and hard work on this Article. Finally, I would like to thank my wonderful research assistants, Bjorn Thorstensen and Anne Wilkinson.

1. NATIONAL CAMPAIGN FOR FAIR ELECTIONS, EXAMPLES OF DECEPTIVE FLYERS 2004, at 1, 3, *available at* http://lccr.3cdn.net/f51ce1b593630cc86c_a7m6b9axu.pdf. In 2004, a flyer containing this information was distributed in Franklin County, Ohio.

In 2006, on Election Day in Prince George's County, Maryland, which is predominately African American,[2] voters arriving at the polls received a voting guide announcing that prominent African Americans had endorsed the Republican candidates, including an African American U.S. Senate candidate.[3] The voting guide falsely suggested[4] that prominent Maryland Democrats were endorsing Republican candidates in the hotly contested gubernatorial and U.S. Senate election.[5] After the election, newly elected Senator Benjamin L. Cardin, whom the African Americans had actually endorsed, testified before the U.S. Senate Judiciary Committee regarding this false campaign literature and urged the U.S. Attorney General to investigate.[6] The Department of Justice, however, did not pursue the matter. Unfortunately, this is symptomatic of most claims involving deceptive practices.

In the last half century, the U.S. Congress has journeyed into the world of

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2. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: PRINCE GEORGE'S COUNTY, MD. (2008), http://quickfacts.census.gov/qfd/states/24/24033.html.

3. NATIONAL CAMPAIGN FOR FAIR ELECTIONS.ORG, EXAMPLES OF DECEPTIVE FLYERS 2006, at 1, 1, *available at* http://lccr.3cdn.net/58d2ee098f70fd887b_vom6bxgc8.pdf. The guide was entitled "Ehrlich-Steele Democrats" and labeled an "Official Voter Guide." On the cover were three prominent African American politicians: a former and the present county executive and former congressman and President of the National Association for the Advancement of Colored People (NAACP) Kweisi Mfume. Under their names read "[t]hese are OUR choices." *Id.*; *Prevention of Deceptive Practices and Voter Intimidation in Federal Elections: Hearing on S. 453 Before S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Sen. Cardin).

4. Laura Vozzella, *Michael Steele's Sorry. So Sorry.*, BALT. SUN, Mar. 4, 2009, at A2.

5. NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 3. These prominent African Americans had endorsed candidate Ben Cardin for the U.S. Senate. *See* Matthew Hay Brown, *Senate Bill Outlaws Campaign Trickery; Cardin Backs Curb on Bogus Endorsements*, BALT. SUN, Feb. 1, 2007, at B5. Additionally, the guide included a "Democratic Sample Ballot" that included the correct date and times for the elections and endorsed Democratic candidates on all levels—local, county, state, and federal. NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 3, at 2. Yet, the guide neglected to endorse the Democratic candidates for governor and U.S. Senate. *Id.* It endorsed the re-election of the Republican governor and the election of African American Republican U.S. Senate candidate Michael Steele. *Id.* The guide included a notation that Ehrlich and Steele campaigns had "Paid and Authorized" the publication and distribution of this campaign literature. *Id.* Media accounts also attributed the Ehrlich and Steele campaigns to knowingly distributing this false information. *See, e.g.*, Paul Rogat Loeb, Editorial, *'Election Fraud' Cry Useful Tool for GOP*, BALT. SUN, Mar. 18, 2007, at A23 (alleging that the Steele campaign bussed homeless men to hand out misleading flyers).

6. At the Senate hearing, Senator Cardin said that, "[t]his type of deceptive literature is despicable and outrageous. It is clearly designed to mislead African-American voters about prominent endorsements by well-respected politicians." *Prevention of Deceptive Practices and Voter Intimidation in Federal Elections: Hearing on S. 453 Before S. Comm. on the Judiciary*, *supra* note 3 (statement of Sen. Cardin).

election administration on three distinct and important occasions: the passage of the Voting Rights Act of 1965 (VRA),[7] the National Voter Registration Act of 1993 (NVRA),[8] and the Help America Vote Act (HAVA).[9] Despite recent debates, new legislation, and the continued enforcement of various voting statutes, problems persist in the operation of our participatory democracy.[10] Legislation has done little to forward the debate on the preeminence and resurgence of voter intimidation and deceptive tactics. The most recent legislation, NVRA and HAVA, dealt primarily with election administration issues, such as voter registration and machinery.[11] An overlooked area involving

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7. The Voting Rights Act, 42 U.S.C. § 1973 (2006). This Act, which has been heralded as the most effective piece of congressional legislation in our nation's history, outlawed practices such as literacy tests, empowered federal registrars to register citizens to vote, and gave the Attorney General the power to bring widespread litigation instead of the piecemeal approach of the past. As a result, wide disparities between Blacks and Whites in voter registration narrowed considerably throughout the South and the number of African American elected officials increased tremendously. *See* S. REP. 94-295, at 11 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 777 (noting that the VRA was "hailed by many to be the most effective civil rights legislation ever passed" in this country).

8. 42 U.S.C. § 1973gg (2006). The stated purpose of the NVRA is to increase voter registration and participation. *Id.* The law also provides uniform standards for maintaining the list of registered voters, conducting voter purges and provides additional safeguards under which registered voters would be able to vote notwithstanding a change in address in certain circumstances. *Id.* § 1973gg-3.

9. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified at 42 U.S.C. §§ 15301-15545 (2006)). The stated purpose of HAVA is

> to establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.

Id.

10. During the 2008 election, nonpartisan organizations chronicled numerous voting irregularities in voter registration, felon disenfranchisement, long lines at the polls, poll watcher challenges, unwarranted challenges to student voters, and deceptive practices. *See, e.g.*, *Hearing on Lessons Learned from the 2008 Election Before Subcomm. on Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (statement of Tova Andrea Wang, Vice President, Research, Common Cause); *id.* (statement of Hilary O. Shelton, Director, Washington Bureau, NAACP); *see also Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election: Hearing Before S. Judiciary Comm.*, 111th Cong. 1 (2008) (statement of Gilda R. Daniels, Assistant Professor, University of Baltimore School of Law).

11. "HAVA defined minimum election administration standards that all states must follow, notably in the areas of voter identification and database management." Debra Milburg, Note, *The National Identification Debate: "Real ID" and Voter Identification*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 443, 458 (2008); *see also* Bruce E. Cain, *Election Administration: Still Broken After All*

voter access concerns the proliferation of deceptive acts and voter intimidation. Each of these phenomena requires exemplification.

A person or group intentionally places an anonymous flyer in a mailbox, leaves a voicemail message, distributes a campaign publication on Election Day, or sends an email prior to early voting—all containing misleading and false information. The information is often plausible: it could address the expected massive turnout at an election and, thus, the need to extend voting to Tuesdays for Republicans (Whites) and Wednesdays for Democrats (Blacks).[12]

Deceptive practices tend to target racial and language minorities and are a throwback to the post-Reconstruction, Jim Crow-era tactics that sought to deny minority citizens the right to freely participate in the electoral process.[13] Voter intimidation became a primary and deadly issue after the Civil War and during Reconstruction,[14] when newly freed slaves were systematically denied their right

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These Years, 8 ELECTION L.J. 219 (2009) (reviewing VOTING IN AMERICA, VOL. 3, AMERICAN VOTING SYSTEMS IN FLUX: DEBACLES, DANGERS, AND BRAVE NEW DESIGNS (Morgan E. Felchner ed., 2008)); Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118 (2007) (reviewing ROY G. SALTMAN, THE HISTORY AND POLITICS OF VOTING TECHNOLOGY: IN QUEST OF INTEGRITY AND PUBLIC CONFIDENCE (2006)).

12. *See, e.g.*, NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 1. The now infamous flyer from Franklin County, Ohio, pretended to come from the County Board of Elections urging Republicans and Democrats to vote on different days; the Republican-designated day was the true Election Day. *Id.* Deceptive election flyers often falsely indicate the wrong date for an election. *Id.*; *see also infra* note 32 (showing a flyer distributed prior to the November 4, 2008 federal election falsely alerting voters that in an emergency General Assembly session the Virginia legislature "adopted the following [sic] emergency regulations to ease the load on local electoral [sic] precincts and ensure a fair electoral process" that Republicans would vote on Tuesday, November 4, and Democrats on Wednesday, November 5; the flyer was distributed in the predominately minority areas of Hampton Roads, VA). Additionally, at George Mason University in Fairfax, Virginia, observers described "official-looking flyers" stating that due to the projection of high voter turnout, Democrats should vote the day after the general election, November 5. Thomas Frank & Richard Wolf, *Pranks, Mischief Reach Higher Level at Colleges*, USA TODAY, Nov. 5, 2008, at 10A (detailing bogus emails sent to students at George Mason University stating that voting on campus had been moved back one day and discussing problems at other campuses such as Ohio State and Florida State where students received text messages to the same effect, and at Virginia Tech, where students received mass-emails via Facebook regarding bogus changes to voting schedules); *see also* ELECTION PROTECTION 2008: HELPING VOTERS TODAY, MODERNIZING THE SYSTEM FOR TOMORROW, PRELIMINARY ANALYSIS OF VOTING IRREGULARITIES 12 (2008), *available at* www.866ourvote.org/tools/documents/files/0077.pdf.

13. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 258-59 (2000) (describing tactics that segregationists used during the Jim Crow era to "thwart" Black political participation, including literacy tests, grandfather clauses, poll taxes, "understanding test[s]" purges and in some instances murder).

14. *See, e.g.*, TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION—1742-2004, at 46 (2005) (stating that in the mid-1800s violent action meant to intimidate voters had reached disturbing levels); *see also* Gilda R. Daniels, *A Vote*

to vote in Southern states through the use of violence and threatening tactics.[15] The South enacted measures, such as poll taxes, literacy tests, and all-White primaries that would limit the effect of the new and populous electorate.[16] Efforts to disenfranchise African American voters persisted after the Civil War to counter the efforts of newly freed slaves effort to obtain equal access to the ballot.[17] Indeed, during the Civil Rights Movement, the primary disenfranchising and intimidating efforts were organized around registering voters and providing access to the electoral process. In 1957, Dr. Martin Luther King, Jr., emphasized the "conniving methods" that were used to prohibit Negroes from registering to vote.[18] Although historical accounts of voter intimidation are often full of death threats and fear, today's intimidation and deception tend to exist in a less fatal form, but continue to target minority communities.[19] Threats of incarceration or

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Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters, 47 U. LOUISVILLE L. REV. 57 (2008).

15. RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON 91 (Da Capo Press 1997) (1954). At the dawn of the twentieth century, segregationists employed the country's most violent measures to ensure White political supremacy. *Id.* In 1900, South Carolina Senator "Pitchfork" Ben Tillman, who led that state's push for segregation, said, "[w]e have done our level best, . . . we have scratched our heads to find out how we could eliminate the last one of them. We stuffed ballot boxes. We shot them . . . . We are not ashamed of it." *Id.*

16. KEYSSAR, *supra* note 13, at 111-12.

> In short order, other states followed suit, adopting—in varying combinations—poll taxes, cumulative poll taxes . . . literacy tests, secret ballot laws, lengthy residence requirements, elaborate registration systems, confusing multiple voting-box arrangements, and eventually, Democratic primaries restricted to white voters. Criminal exclusion laws also were altered to disfranchise men convicted of minor offenses, such as vagrancy and bigamy.

Id.

17. *See* ERIKA WOOD, BRENNAN CENTER FOR JUSTICE, RESTORING THE RIGHT TO VOTE 7-8, *available at* http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/restoring_20080226/Brennan_RestoringVote_2008.pdf.

18. Dr. Martin Luther King, Jr., decried deceptive practices and intimidation in his *Give Us the Ballot* speech. Dr. King stated: "[A]ll types of conniving methods are still being used to prevent Negroes from becoming registered voters. The denial of this sacred right is a tragic betrayal of the highest mandates of our democratic tradition." Dr. Martin Luther King, Jr., Give Us the Ballot, Address at the Prayer Pilgrimage for Freedom (May 17, 1957), *available at* http://mlk-kpp01.stanford.edu/primarydocuments/Vol4/17-May-1957_GivesUsTheBallot.pdf.

19. *See, e.g.*, NAT'L NETWORK FOR ELECTION REFORM, DECEPTIVE PRACTICES AND VOTER INTIMIDATION 1, *available at* http://www.nationalcampaignforfairelections.org/page/-/Deceptive%20Practices%20Network%20Issue%20Paper.pdf (describing deceptive and intimidating voting practices in minority communities including the following: In 1998, in South Carolina, a state representative mailed 3,000 brochures to African American neighborhoods, claiming that law enforcement agents would be "working" the election, and warning voters that "this election is not worth going to jail!!!!!!"). The African American community has been and continues to be a

deportation instead of death often accompany voter intimidation and deception efforts.[20] For example, in 2006, in certain counties in Virginia with considerable minority populations, voters received automated calls misinforming them that they would be arrested if they tried to vote on Election Day and falsely reported that their polling places had changed.[21] Consequently, conniving methods continue to exist and adopt new forms.

In the 2008 federal election, the country also saw the proliferation of the use of the Internet in both political campaigns[22] and advancing political misinformation.[23] The government's inability to prosecute offenders for printed flyers or other traditional methods of conducting deceptive practices maximizes the possibility of propagating misinformation via the Internet.[24] The resulting blow to public confidence discourages citizens from participating in the electoral process.

Voter deception involves, inter alia the distribution of misinformation regarding the time, place, and manner of elections as well as voter eligibility.[25]

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longstanding target of threatening tactics. *Id.*

20. *See, e.g.*, *id.* In 2006, roughly 14,000 Democratic voters with Spanish surnames in Orange County, California received letters before the November 7 election falsely warning that immigrants could face jail time or deportation for vote. *Id.*

21. *See* LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INCIDENTS OF DECEPTIVE PRACTICES AND VOTER INTIMIDATION IN THE 2006 ELECTIONS, *available at* http://lccr.3cdn.net/d6af26cb3lff5ee166_vlm6x6x5.pdf.

22. *See, e.g.*, Matthew Fraser & Soumitra Dutta, *Obama and Facebook Effect: His Masterful Use of Web Tools Helped Him Win the Presidency*, MEDIAWEEK, Nov. 24, 2008, at 10, *available at* 2008 WLNR 25922891; Joe Garofoli, *Obama Eyes New Role for Internet*, S.F. CHRON., Nov. 24, 2008, at A1; Laura Olsen, *Obama Team Capitalizes on Link to Youth*, CHI. TRIB., Nov. 26, 2008, at 7C.

23. *See, e.g.*, Ben Conery, *Electronic Scams Attempt to Keep New Voters at Home*, WASH. TIMES, Nov. 5, 2008, at B02 (discussing voter-suppression tactics where the perpetrators utilized text messages and Facebook and detailing Facebook messages that said election schedules had changed or that various parties were supposed to vote on different days). The article also discusses problems at Drexel University where students were told via flyers that they "would be arrested at the polls if they had unpaid parking tickets." *Id.* Overall, however, according to the article, incidents of voter suppression were far less prominent and on a much lesser scale than in past elections. *Id.*; *see also* Common Cause, The Lawyers Committee for Civil Rights Under Law and the Century Foundation, *Deceptive Practices 2.0: Legal and Policy Responses* (on file with author); Dan Morain, *Some Obama Links Will Mislead*, L.A. TIMES, Aug. 30, 2008, at A18; Joy-Ann Reid, *Bogus Emails Raise Anxiety Over Voter ID Law*, S. FLA. TIMES, Oct. 3, 2008, at A1.

24. The use of computers and other electronic mechanisms in the distribution of political information has created yet another difficulty in thwarting these activities. Federal and state laws are ill-equipped for Internet based deception. *See infra* Part I.A.2.

25. The prevalence of deceptive practices and misinformation in the political arena has raised the profile of several websites dedicated to providing accurate information. *See, e.g.*, FactCheck.org, http://www.factcheck.org/ (last visited Oct. 7, 2009); PolitiFact.com, http://www.politifact.com/truth-o-meter/ (last visited Oct. 7, 2009); Snopes.com; http://www.snopes.com/

These deceptive practices regularly have as their main objective to misinform unwanted minority, elderly, disabled, and language-minority voters[26] in an effort to suppress votes.[27] Generally, the proliferation of misleading documents is utilized to confuse and thwart eligible voters from participating in the electoral process.

Many flyers are falsely disseminated in the name of an official governmental agency.[28] Additionally, the surge of computers, cell phones, and other technology continues to hinder the identification of persons engaging in e-deception.[29] Although these examples are a departure from heated campaign battles, their reach is far and their impact discernible.

Efforts to deny voters the opportunity to participate in the electoral process are not often investigated or litigated for myriad reasons, including the lack of clear statutory authority and willingness to enforce.[30] Although the intent of these practices is often clear and invidious, i.e., to suppress minority votes, it is often difficult to know how many people are affected by voter intimidation or deception.[31] The anonymous nature of deceptive flyers and electronic documents

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politics/politics.asp (last visited Oct. 7, 2009) (containing a section on its website specifically addressing political myths).

26. *See* Daniels, *supra* note 14, at 58 (defining unwanted voters as "the disabled, elderly, poor, or minority voter").

27. *See, e.g.*, *Prevention of Deceptive Practices and Voter Intimidation: Hearing Before the S. Comm. on the Judiciary*, *supra* note 3 (statement of John Trasviña, President and General Counsel, Mexican Am. Legal Def. and Educ. Fund); Ian Urbina, *Democrats Fear Disillusionment in Black Voters*, N.Y. TIMES, Oct. 27, 2006, at A1, *available at* http://www.nytimes.com/2006/10/27/us/politics/27race.html?pagewanted=all.

28. Prior to the 2008 federal election in Virginia, an anonymous flyer with the state seal, distributed in minority areas in Hampton Roads, Virginia, indicated that Republicans would vote on Tuesday and Democrats on Wednesday. Julian Walker, *State Police Investigate Source of Phony Election Flier*, VA.-PILOT, Oct. 30, 2008, *available at* http://hamptonroads.com/2008/10/state-police-investigate-source-phony-election-flier. Police investigated the source of the flyer and instead of filing charges decided that it was a "joke that got out of control." *Id.*; Julian Walker, *Officials Find Source of Fake Election Flier, Won't Press Charges*, VA.-PILOT, Nov. 3, 2008, *available at* http://hamptonroads.com/2008/11/officials-find-source-fake-election-flier-wont-press-charges. Virginia is one of the few states that actually has a statute outlawing deceptive practices in voting, classifying it as a Class 1 misdemeanor. *See* VA. CODE ANN. § 24.2-1005.1 (2007).

29. Although convicted for an illegal voter suppression scam, Allen Raymond, author of *How to Rig an Election: Confessions of a Republican Operative* (2008), stated in a *National Journal* article that "[a]n e-mail is far more traceable than an anonymous flier." *See, e.g.*, David Herbert, *Voter Suppression Hits the Web*, NAT'L J. ONLINE, Oct. 29, 2008, www.nationaljournal.com/njonline/print_friendly.php?ID=no_20081027_9705.

30. *See infra* Part II.A.

31. People for the American Way Foundation, *The Long Shadow of Jim Crow: Voter Suppression in America* 3-4 (2004), *available at* http://67.192.238.59/multimedia/pdf/Reports/thelongshadowofjimcrow.pdf (noting that approximately four million Americans were denied the right to vote in 2000 and included voter deception and intimidation as causes).

makes it immensely difficult to determine the source of publication and tends to thwart investigations and prosecutions.[32] These practices, however, have significant consequences for individual voters attempting to exercise their fundamental right to vote. Moreover, these practices threaten the integrity and legitimacy of the democratic process.

Despite this resurgence of suppression, the federal government has underutilized its ability to litigate these types of cases. In fact, the Justice Department said that it lacked the authority to pursue these cases, despite their potential impact on the fundamental right to vote.[33] The federal government has statutes at its disposal to prevent voter intimidation and deceptive practices.[34] But statutes penalizing voter intimidation are rarely used[35] and have historically been unsuccessful.[36]

Legal scholars have addressed the effect of voter identification and voter fraud on voter confidence and the integrity of the democratic system.[37] Law

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32. *See* sources cited *supra* note 28.

33. Hearing Before the S. Judiciary Comm., *supra* note 10.

34. *See infra* Part II.A.

35. For example, the Department of Justice has brought only four cases in the history of Section 11(b) in the VRA's forty-five-year history. *See infra* Part II.A.2.

36. *See* discussion *infra* Part II.A.1-2.

37. *See, e.g.*, Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1750-51 (2008) (arguing the use of photo identification requirements bears little correlation to the public's beliefs about the incidence of fraud); Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1066 (2009) (arguing that "the history of the right to vote has been a steady struggle between those who wish to constrain or restrict the vote by raising the cost and those who wish to make the vote more accessible by lowering the costs" and these costs must be factored into voting rights jurisprudence to ensure free and accessible elections); Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 97 (2007) (proposing "that the right of participation, though perhaps only denied to a few when new voter requirements are put in place, is the most relevant (and serious) harm to analyze in the voter fraud debate"); Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1 (2007); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 631 (2007) (arguing that "policymakers should instead examine empirical data to weigh the costs and benefits of [I.D.] requirement[s]" because "[e]xisting data suggest that the number of legitimate voters who would fail to bring photo identification to the polls is several times higher than the number of fraudulent voters, and that a photo-identification requirement would produce political outcomes that are less reflective of the electorate as a whole"); Richard Tyler Atkinson, Note, *Underdeveloped and Overexposed: Rethinking Photo ID Voting Requirements*, Note, 33 J. LEGIS. 268, 269 (2007) (arguing "that photo ID requirements fail to fulfill their primary purpose (the prevention of fraud); in fact, photo ID requirements decrease legitimate voter turnout (and therefore may increase the impact of fraud"); Andrew N. DeLaney, Note, *Appearance Matters: Why the State Has an Interest in Preventing the Appearance of Voting Fraud*, 83 N.Y.U. L. REV. 847 (2008) (arguing that the state has an interest not only in preventing voting fraud, but also in preventing the appearance of voting fraud), and arguing the constitutionality of photo identification

review articles have also discussed voter intimidation on the state and local levels.[38] Most scholars and statutes conflate fraud with intimidation and deceptive practices,[39] without illuminating the nuances that make deceptive practices an identifiable and worthy cause of action. The lack of a well-defined statute coupled with poor enforcement and deficient deterrents necessitate a reasoned view of ways to uphold the democratic principles of equal access to the

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requirements in elections); Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 731 (2008) (examining "the results of these legal challenges and suggest[ing] the parameters in which a state legislature can fashion a constitutional voter-identification requirement"); Aaron J. Lyttle, Note, *Constitutional Law—Get the Balance Right: The Supreme Court's Lopsided Balancing Test for Evaluating State Voter-Identification Laws;* Crawford v. Marion County Election Board, *128 S. Ct. 1610 (2008)*, 9 WYO. L. REV. 281, 283 (2009) (arguing that the Supreme "Court adopted a lopsided balancing test, placing greater emphasis on states' interests in preventing fraud than on the risk of burdening voting rights" and "the Court's failure to weigh voters' interests against those of the state leaves the prior confusion untouched, thus endangering voting rights"); Milburg, *supra* note 11, at 466 (discussing "recent developments and ongoing controversies concerning the REAL ID Act of 2005" and "explores the ramifications of a national identification card on the recent state trend of requiring identification at the polls").

38. *See, e.g.*, Anita S. Earls et al., *Voting Rights in North Carolina: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 577, 588 (2008) (discussing voting rights violations in North Carolina from 1982 to 2006 and summarizes the various barriers that minority voters in North Carolina voters still face, including intimidation against minority voters and lack of proper accommodations for disabled voters); Patrick J. Troy, *No Place to Call Home: A Current Perspective on Troubling Disenfranchisement of College Voters*, 22 WASH. U. J.L. & POL'Y 591, 616 (2006) (discussing voter intimidation of college students and proposing solutions to that problem, such as locating polling places on campus and creating a national standard for voter residency requirements); Katie Fowler, Note, *Deceptive Voting Practices and Voter Intimidation in the Wake of* United States v. Charleston County, 2 CHARLESTON L. REV. 733, 749 (2008) (tracing the presence vote dilution among minority voters in at large elections in South Carolina before *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003), and the impact that decision had on such voting systems).

39. See, e.g., U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 13-14 (2006), http://www.eac.gov/clearinghouse/docs/reports-and-surveys-2006electioncrimes.pdf/attachment_download/file, which defines election crimes, i.e., vote fraud, intimidation and deception as follows:

> [I]ntentional acts or willful failures to act, prohibited by state or federal law, that are designed to cause *ineligible* persons to participate in the election process; eligible persons to be excluded from the election process; ineligible votes to be cast in an election; eligible votes not to be cast or counted; or other interference with or invalidation of election results. Election crimes generally fall into one of four categories: acts of deception, acts of coercion, acts of damage or destruction, and failures or refusals to act.

Id. at 13 (emphasis added); *see also* Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 1 (2009) (defining election-related fraud into categories of "voter-initiated" and "voter-targeted").

franchise.

The Equal Protection Clause of the Fourteenth Amendment[40] provides the means for governments to exercise their authority to address voter deception. In *Crawford v. Marion County Election Board*,[41] the Supreme Court found that Indiana had a compelling interest in preventing fraud, in part because doing so preserved public confidence and legitimate votes from dilution.[42] Likewise, the Supreme Court has found that states possess a compelling interest in preventing voter intimidation.[43] A comparable state interest applies to voter deception. When the state or federal government has a compelling interest in protecting an individual's right but fails to protect that right, the Constitution should not leave it unguarded.[44] Although various federal and state statutes remain at the government's disposal to combat deceptive practices, the Equal Protection Clause should intervene to prevent states from outlawing vote dilution ensuing from fraud while under-enforcing vote dilution ensuing from voter deception. A similar result should occur when analyzing voter deception.

This Article exposes the deficiencies in the current state of the law governing voter intimidation and deceptive practices. It attempts to correct the legal deficiencies within the confines of the constitutional framework. This Article provides a legal framework for voter intimidation and deception as well as solutions to addressing the quagmire of federal laws that unfortunately do not sufficiently deter these activities. It also presents a careful analysis of the conceptual and legal issues concerning deceptive practices. Part I provides contemporaneous examples of voter deception and illustrates the need for comprehensive and strategic legal definitions for deceptive practices. Part II discusses the gaps in existing statutes, the lack of enforcement of those statutes, and the government's current focus on voter fraud and using statutes against communities that are traditionally victims of deception. Part III argues for a Constitutional response under the Equal Protection Clause and recognizes First Amendment and other Constitutional constraints. Part IV proposes a legislative response that provides additional protections for individuals or groups victimized

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40. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

41. 553 U.S. 181 (2008).

42. *Id.* at 184 (discussing the state's ability to impose burdens on voters through stricter voter identification standards and finding the state's justification for requiring voter ID, preventing voter fraud, compelling).

43. *See* Burson v. Freeman, 504 U.S. 191, 210 (1992) (finding that the state could place constraints on electioneering near polling places on Election Day).

44. *See, e.g.*, Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 930 (2007) (discussing the balance between the right to vote of cognitively impaired individuals and the existing constitutional and legal framework that governs each citizen's right to vote; arguing that the state must begin to balance disabled voters' interest in participation within the electoral system and the broader public interest in maintaining the integrity of the political system).

by voter deception and offers a private right of action and improved criminal and civil penalties to strengthen existing laws.

I. DEFINING DECEPTION

Elections in this new millennium have witnessed a revival of voter intimidation and deceptive practices across the country.[45] In every federal election since the year 2000, suppressors have falsely instructed citizens under the guise of governmental authority and in some instances using threats and penalties to disseminate false information in predominately minority areas.[46] In 2004, the "Milwaukee Black Voters League," an organization that does not exist, distributed a flyer warning people found guilty of any infraction, including traffic tickets, to stay away from the polls or face possible imprisonment.[47] The flyer read:

> If you've already voted in any election this year, you can't vote in the presidential election; If anybody in your family has ever been found guilty of anything, you can't vote in the presidential election; If you violate any of these laws, you can get ten years in prison and your children will get taken away from you.[48]

During the 2008 federal election, many states endured instances of intimidation and deception targeting the minority community.[49] These examples illustrate the traditional deceptive practices of disseminating false information in minority communities.[50]

The 2008 presidential election cycle brought about a contested election in

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45. *See supra* notes 1-6 and accompanying text.

46. *See* NAT'L NETWORK FOR ELECTION REFORM, *supra* note 19, at 2.

47. *Id.*

48. *Id.*

49. ELECTION PROTECTION 2008, *supra* note 12, at 1. Since 2004, the Election Protection campaign, which is comprised of approximately eighty organizations including the Lawyers Committee for Civil Rights Under Law, People for the American Way Foundation Latino Justice, and the NAACP have chronicled deceptive practices and voter intimidation taking place across the country. *Id.*; *see also* NAT'L NETWORK FOR ELECTION REFORM, *supra* note 19, at 3 (describing a 2003 election in Philadelphia, where voters in African American areas were systematically challenged by men carrying clipboards, driving a fleet of some 300 sedans with magnetic signs designed to look like law enforcement insignia); Tim Shipman & Tom Leonard, *Turnout Hits Record as Fraud Claims Dog Polling Day*, DAILY TELEGRAPH (LONDON), Nov. 5, 2008, at 2 (providing a broad overview of reported Election Day problems in the United States relevant to intimidation, suppression, and deception).

50. *See* Tova Andrea Wang, *Election 2004: A Report Card*, AM. PROSPECT, Jan. 1, 2005, http://www.reformelections.org/commentary.asp?opedid=824 (describing deceptive acts in Ohio in 2004, where newly registered voters were falsely warned that if the NAACP, the John Kerry Presidential campaign, America Coming Together, or a local congressional campaign registered them to vote, that they were not eligible to vote).

which citizens were bombarded with robo calls[51] and misleading flyers.[52] The nature of these calls was similar to traditional deceptive flyers in that they contained false information and were generally targeted at both minority and Democratic voters, but involved less cost and more impact.[53]

Suppressors also used electronic deception to intimidate and deceive voters. In Texas, an Internet message instructed voters to cast a straight Democratic ticket and separately punch Barack Obama's name, which would negate their vote.[54] Accordingly, e-deception provides yet another concern. Indeed, emails touting the ineligibility of voters because of foreclosures were prevalent and caused at least one Attorney General to try to provide accurate information.[55] Although the Maryland Attorney General and others utilized the media in an attempt to correct the misinformation, in most instances, these types of accounts remain unparsed and unprosecuted.

A. A Deceptive Definition

Deception is defined as "the practice of deliberately making somebody believe things that are not true; an act, trick, or device intended to deceive or mislead somebody."[56] When the act of deception partners with the act of voting,

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51. *See, e.g.*, Jennifer Duck, *Dems Claim GOP Launched 'Dirty' Phone Campaign*, ABC NEWS, Nov. 6, 2006, *available at* http://abcnews.go.com/Politics/story?id=2633458&page=1; Sam Stein, *Wave of McCain Robocalls Reported, Some May Violate State Law*, HUFFINGTON POST, Oct. 16, 2008, http://www.huffingtonpost.com/2008/10/16/massive-rnc-robocall-may_n_135348.html. Robo calls are a fairly new technological advance that allow an individual or group to make multiple phone calls to promote a political message and can be used to disseminate misleading information to masses in an effort to sway voters. *See* Charles Babington & Alec MacGillis, *It's a Candidate Calling. Again: Republicans Deny Subterfuge as Phone Barrages Anger Voters*, WASH. POST, Nov. 7, 2006, at A8.

52. Susan Q. Stranahan, *Broken Elections, Stolen Votes—Part V*, CENTER FOR PUB. INTEGRITY, July 7, 2008, http://www.buyingofthepresident.org/index.php/stories/broken_elections_stolen_votes_part_five/.

53. In Missouri in 2006, the Secretary of State reported that citizens had received robo calls informing them that their polling places had changed when they had not and warning voters to bring voter ID or they would not be permitted to vote. *See* OFF. OF THE SECRETARY OF STATE, VOTERS FIRST: AN EXAMINATION OF THE 2006 MIDTERM ELECTION IN MISSOURI 17 (2007), http://www.sos.mo.gov/elections/VotersFirst/2006/VoterFirst-Complete.pdf.

54. *See* Herbert, *supra* note 29 (arguing that voters are being suppressed through communications on the Web this campaign season by capitalizing on new technologies and taking advantage of an electorate that increasingly consumes political news online).

55. *See* MD. OFF. OF THE ATT'Y GEN., REPORT ON THE ATTORNEY GENERAL'S TASK FORCE ON VOTING IRREGULARITIES (2008), http://www.oag.state.md.us/Reports/Voting%20Task%20Force%20Repor4_28.pdf.

56. ENCARTA WORLD ENGLISH DICTIONARY (N. Am. Ed. 2009), *available at* http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?texttype=3&search=deception (containing a basic definition for the act of deception).

the jurisprudence leaves open whether the practice of deliberately misleading a voter serves as a legally actionable deed.[57] Consequently, voter deception is the act of knowingly deceiving voters regarding the time, place, or manner of conducting elections or the qualifications for or restrictions on voter eligibility.

In considering deceptive deeds, one must also consider their relation to fraud and intimidation, particularly because those areas have far more protections than deceptive practices and include some similarities. Voter deception is, in many ways, similar to voter fraud and voter intimidation, yet some distinctions exist. Scholars have sought to define vote fraud,[58] and statutes exist for determining voter intimidation.[59] Few have attempted to conquer the amorphous and arguably ambiguous definition of voter deception.[60]

In an effort to encompass all illegal election activity, the Election Assistance Commission (EAC)[61] created a definition of "election crimes."[62] The definition, however, is overbroad and only tangentially includes deceptive acts.[63] In the EAC's broad definition, only the terms "intentional acts . . . designed to cause . . . eligible votes not to be cast or counted" tangentially address deceptive practices.[64] Indeed, it speaks more to intimidation or fraud than deception. The

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57. *See infra* Part II.A.1-2.

58. *See, e.g.*, Ansolabehere & Persily, *supra* note 37, at 1758-59 (analyzing through surveying the impact of voter fraud and its relation to participation in the political process and finding that the use of photo identification requirements bears little correlation to the public's opinion about the incidence of fraud); Flanders, *supra* note 37, at 95 (framing the debate as the seriousness of voter fraud versus the deterrence of voters in passing laws to deter this activity such as photo identification requirements at the polls).

59. *See infra* Part II.A.1.

60. *See e.g.*, Overton, *supra* note 37, at 636 (arguing the need for empirical data and less anecdotes in imposing voter ID laws).

61. U.S. ELECTION ASSISTANCE COMM'N R., *supra* note 39.

62. *See* Job Serebrov & Tova Wang, *Voting Fraud and Voter Intimidation Report to the U.S. Election Assistance Commission on Preliminary Research & Recommendations*, 6 ELECTION L.J. 330, 332 (2007) (defining "election fraud" as "any intentional action, or intentional failure to act when there is a duty to do so, that corrupts the election process in a manner that can impact on election outcomes"); Tova Andrea Wang, *A Rigged Report on U.S. Voting*, WASH. POST, Aug. 30, 2007, at A21.

63. The EAC tasked Job Serebrow and Tova Wang to provide a report on the prevalence of voter fraud and voter intimidation. *See* Serebrov & Wang, *supra* note 62, at 331. The final report was met with some criticism. *See* Wang, *supra* note 62. In the report, however, the EAC broadly defines election crimes. *See supra* note 39 and accompanying text.

64. A 2007 EAC report defined election crimes, which would include voter fraud and voter intimidation, but not voter deception as

> any intentional action, or intentional failure to act when there is a duty to do so, that corrupts the election process in a manner that can impact on election outcomes. This includes interfering in the process by which persons register to vote; the way in which ballots are obtained, marked, or tabulated, and the process by which election results are canvassed and certified.

EAC definition serves as a medley of actions that allow voter deception to remain ignored as a serious offense to the democratic process.

In 2007, then-newly elected Senator Barack Obama and senior statesman Senator Charles Schumer unsuccessfully attempted to fill this void. In the 110th Congress, Senators Obama and Schumer introduced the Deceptive Practices and Voter Intimidation Prevention Act of 2007, which would criminalize many of the tactics of voter deception and increase the penalty from one to five years for anyone convicted of voter intimidation.[65] The bill prohibits a person from deceiving a voter regarding the time, place, or manner of the election.[66] Further, it requires the Attorney General to provide "accurate" election information when deception allegations are proven and to report to Congress on allegations of deception after each federal election.[67] Because this bill speaks to voter deception, it specifically reinforces the need for stricter penalties and greater clarification. In some instances, however, it tends to fall short of its goal.

1. Deception as Fraud.—Generally, voter fraud involves "obtaining and marking ballots, the counting and certification of election results, or the registration of voters."[68] Traditional forms of voter fraud involve voting multiple times under false names, vote buying, and election officials committing fraud through counting spoiled ballots.[69] Intimidation and deceptive practices, however, do not fall squarely within the definition of voter fraud. One scholar suggests that courts should evaluate voter fraud in two separate categories: "voter-initiated" and "voter-targeted."[70] Although voter-initiated acts refer generally to voter fraud and voter-targeted to what is generally considered voter suppression, the joining of these acts tends to negate the deceptive practices for

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Serebrov & Wang, *supra* note 62, at 332. *See* U.S. ELECTION ASSISTANCE COMM'N R., *supra* note 39, at 14.

65. Deceptive Practices and Voter Intimidation Act of 2007, S. 453, 110th Cong. § 3 (2007).

66. *Id.* The Act also designates the Civil Rights Division of the Justice Department as the federal agency responsible for correcting misinformation that comes to its attention and to provide Congress with a report of any deceptive practices allegation within ninety days of any election for federal office, including primaries, and run-offs. S. 453, § 4.

67. The Deceptive Practices and Voter Intimidation Prevention Act of 2007 has remained dormant in the Senate. A House version of the bill, H.R. 1281, passed June 25, 2007 out of the House. A 2005 version of the bill in the House would have provided a private right of action for deceptive practices under 42 U.S.C. § 1971(c) (2006) and provides criminal penalties. Deceptive Practices and Voter Intimidation Prevention Act of 2005, H.R. 4463, 109th Cong. § 2(a)(2) (2005); *see infra* Part IV.A.

68. CRAIG C. DONSANTO & NANCY L. SIMMONS, FEDERAL PROSECUTION OF ELECTION OFFENSES 3 (U.S. Dep't of Just., Crim. Division, Pub. Integrity Sect., 7th ed. 2008), *available at* www.justice.gov/criminal/pin/docs/electbook-rvs0807.pdf.

69. LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD 6 (2007), *available at* http://www.bradblog.com/Docs/politicsofvoterfraudfinal.pdf.

70. *See* Benson, *supra* note 39, at 1 (arguing that courts should consider the initiators of the fraud who commits the acts and the effects on our democracy).

the more politically feasible voter fraud.[71] The level of voter fraud has long been debated and serves as an impetus for recent legislation meant to deter alleged fraudulent activity.[72]

The Public Integrity Section of the Department of Justice (PIN), which is primarily responsible for pursuing vote fraud cases, defines "election fraud" as "involv[ing] a substantive irregularity relating to the voting act—such as bribery, intimidation, or forgery—which has the potential to taint the election itself."[73] PIN acknowledges that some acts that may arguably constitute fraud may nonetheless not be recognized as a federal election crime.[74] It specifically points to instances of "distributing inaccurate campaign literature" as an example of "reprehensible" actions that generally fall outside the scope of federal statutes.[75] Thus, the example of Prince George's County, discussed earlier, although reprehensible and arguably involving deception, would not fall within a prosecutable form of election fraud and, as such, would not be pursued or prosecuted.[76]

Both voter fraud and voter deception are types of electoral interference that seek to affect electoral outcomes. Both fraud and deception involve untruths; deception involves limiting the number of voters; and voter fraud attempts to increase those numbers falsely. Scholars have debated the wisdom of election laws passed to address voter fraud,[77] but the need for stronger and more potent voter suppression and, in particular, voter deception laws is left wanting. Consequently, voter fraud and voter deception enjoy different outcomes and should require different legislative strategies, definitions, and penalties.[78]

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71. *Id.* State legislatures have focused much of their attention on combating voter fraud through the implementation of various voter identification laws. MINNITE, *supra* note 69, at 61. The voter identification debate has been characterized as a strictly partisan fight. *Id.* at 3. States that passed voter identification laws were Republican-controlled. *Id.* at 6. Most Democratic-controlled governments rejected voter identification legislation that made it more difficult for citizens to cast a ballot. *Id.*; *see id.* at 5 (finding that "[t]he claim that voter fraud threatens the integrity of American elections is itself a fraud").

72. LORI MINNITE & DAVID CALLAHAN, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 13-17 (2003) (discussing the lack of relationship between election fraud and requiring photo identification); *cf.* JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY (2004) (discussing recent examples of electoral tampering through voter fraud).

73. *See* DONSANTO & SIMMONS, *supra* note 68, at 24.

74. *See id.* at 47.

75. *Id.*

76. *See* discussion *supra* Part I.A.

77. *See, e.g.*, Overton, *supra* note 37, at 681 (concluding that voting identification requirements may prevent fraud but also prevent legitimate voters from casting a ballot).

78. A. David Pardo, *Election Law Violations*, 45 AM. CRIM. L. REV. 305, 308, 329 (2008) (discussing election fraud statutes, voter intimidation, and campaign finance and provides alternative theories of prosecution, such as the Travel Act, 18 U.S.C. § 1952 (2006), used to prosecute interstate travelers); *see also* Benson, *supra* note 39, at 1 (discussing how courts should adjudicate "voter-initiated" and "voter-targeted" fraud differently).

2. Deception as Intimidation.—Voter intimidation involves threats, force, or interference in the balloting process in a manner that intimidates the voter from participating in the election process.[79] Federal statutes define intimidation as those actions that involve threats and interfere with a voter's right to exercise the franchise.[80] Threats of prosecution and deportation for committing the act of voting illustrate the types of intimidating acts that currently encompass voter intimidation.[81]

The main distinction between voter intimidation and voter deception is that intimidation of voters carries with it a connotation of some type of threat, e.g., incarceration or deportation.[82] Although the two areas overlap (and may, in fact, be considered synonymous in many cases), deception is more focused on misinformation or purposely disseminating misinformation,[83] while intimidation is characterized by more threatening actions. This distinction, however, could allow a broad definition of voter suppression because the nature of the actions seeks to dissuade voters from participating in the electoral process. The efforts to thwart voter participation through deception and intimidation are similar and fit more securely in an analysis of overall attempts at suppression rather than fraud. Although voter intimidation and deception are similar and statutes exist specifically for intimidation and fraud, no federal legislation directly addresses deception.

B. Voter Suppression

Voter intimidation and deceptive practices fall generally within voter

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79. Wendy Weiser & Margaret Chen, *Voter Suppression Incidents 2008*, BRENNAN CENTER FOR JUST., Nov. 3, 2008, http://www.brennancenter.org/content/resource/voter_suppression_incidents (last visited Oct. 8, 2009). The Brennan Center compiled a list of Voter Intimidation and Deceptive Practices that occurred across the country in the 2008 federal election, many included actions from "officials" intimidating voters. *Id.* For example, in New Mexico a private investigator responding to an allegation from Republican Party operatives questioned voter's eligibility to vote in a June primary. *Id.* The Mexican American Legal Defense and Education Fund sued on behalf of the investigated citizens who were deemed eligible voters. *Id.* Other federal and state statutes that define voter intimidation are discussed *infra* Part II.B.

80. *See* 42 U.S.C. § 1971(b) (2006).

81. *See* NAT'L NETWORK FOR ELECTION REFORM, *supra* note 19, at 2.

82. *See* DONSANTO & SIMMONS, *supra* note 68, at 53.

83. Press Release, Sen. Barack Obama, Obama Bill Would Make Election Fraud, Voter Intimidation Illegal (June 7, 2007), *available at* http://sweetness-light.com/archive/legislation-you-get-from-an-acorn-organizer. The unsuccessful Obama bill, co-sponsored by New York Sen. Charles Schumer, linked deceptive practices and intimidation, defining "deceptive practices" as "involv[ing] the dissemination of false information intended to prevent voters from casting their ballots, *intimidate* the electorate, and undermine the integrity of the electoral process." Deceptive Practices and Voter Intimidation Prevention Act of 2007, S. 453, 110th Cong. § 2 (2007) (emphasis added).

suppression,[84] which seeks to decrease the number of eligible voters and, generally, take the electoral power away from individuals or groups; it also often uses deception or threats to accomplish this goal. PIN admits that no federal statute currently exists that criminalizes voter suppression.[85]

The nature of voter suppression and the ability to document examples of voter deception reinforce the need to prohibit the act of diluting the votes of eligible voters under the Equal Protection Clause. Although voter intimidation and deception are similar and statutes exist specifically for intimidation and fraud, no federal legislation directly addresses deception.[86] Although documented occasions of voter deception exist, few instances exist in the voter fraud context. In fact, the Court noted in *Crawford v. Marion County Election Board*[87] that Indiana had no history of in-person voter fraud.[88] Yet, it passed legislation arguing that it was compelled to provide protections for its citizens against actions that it perceived as a threat to the democratic process.[89] The same, however, is true in the voter deception area and examples of deception are plentiful yet receive less attention.[90]

II. DECEPTIVE LAWS

The Fifteenth Amendment[91] of the U.S. Constitution prohibits the denial of the right to vote on the basis of "race, color or previous condition of servitude." Other amendments prohibit discrimination based on sex[92]and age.[93] A post-Civil

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84. PIN defines voter suppression as follows:

> Voter suppression schemes are designed to ensure the election of a favored candidate by blocking or impeding voters believed to oppose that candidate from getting to the polls to cast their ballots. Examples include providing false information to the public—or a particular segment of the public—regarding the qualifications to vote, the consequences of voting in connection with citizenship status, the dates or qualifications for absentee voting, the date of an election, the hours for voting, or the correct voting precinct. Another voter suppression scheme, attempted recently with partial success, involved impeding access to voting by jamming the telephone lines of entities offering rides to the polls in order to prevent voters from requesting needed transportation.

DONSANTO & SIMMONS, *supra* note 68, at 61.

85. *Id.*

86. *See supra* Part II.

87. 128 S. Ct. 1610 (2008).

88. *Id.* at 1617-18.

89. *Id.* at 1619.

90. *See infra* Part II.B.

91. U.S. CONST. amend. XV, §§1, 2. The Fifteenth Amendment of the U.S. Constitution states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation." *Id.*

92. U.S. CONST. amend. XIX, § 1. The Nineteenth Amendment of the U.S. Constitution states: "The right of citizens of the United States to vote shall not be denied or abridged by the

War statute, 18 U.S.C. § 241, sought to address efforts to deprive Blacks of their Constitutional rights, including the right to vote.[94] Despite this early effort to address intrusions in the right to vote, and later iterations that followed,[95] the need to combat efforts to thwart participation through voter intimidation and deception remains.

It was not until 1939 that Congress specifically sought to penalize intimidating acts that could deny eligible citizens the right to vote with the passage of the Hatch Act. In addition to addressing the appropriate level of political activity for federal employees, the law also made it illegal to intimidate voters in federal elections.[96] Prior to the passage of the VRA, prosecutors utilized 42 U.S.C. § 1971(b) to counter voter-intimidation.[97] In many instances, prosecutors were thwarted by the statutes requirement proof of "purposeful

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United States or by any State on account of sex." *Id.*

93. U.S. CONST. amend. XXVI. The Twenty-sixth Amendment of the U.S. Constitution provides that persons who are eighteen or older are eligible to vote. *Id.*

94. *See* 18 U.S.C. § 241 (2006). This statute provides in part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . [t]hey shall be fined under this title or imprisoned not more than ten years, or both . . . .

This includes protections for the right to vote. *See* Wilkins v. United States, 376 F.2d 552, 554 (5th Cir. 1967).

95. *See infra* Parts II.A-B.

96. *See, e.g.*, S. REP. NO. 1, 76th Cong., 1st Sess. 12, 25, 39 (1939); 84 CONG. REC. 9604 (1939). The portion of the Hatch Act that addresses voter intimidation is codified at 18 U.S.C. § 594 (2006) and states in part:

> [S]uch other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives . . . at any election held solely or in part for the purpose of electing such candidate, shall be fined under this title or imprisoned not more than one year, or both.

Id.

97. The case law indicates that several pre-VRA cases were successful. *See, e.g.*, United States v. Beaty, 288 F.2d 653, 655-56 (6th Cir. 1961) (finding relief against economic coercion, involved eviction of black sharecroppers); United States v. Wood, 295 F.2d 772, 781 (5th Cir. 1961) (granting relief against state prosecution of a black engaged in voter-registration work); United States v. Clark, 249 F. Supp. 720, 828 (S.D. Ala. 1965) (granting relief against baseless arrests and unjustified prosecutions). Others may have been thwarted by the inability to prove purposeful discrimination. *See, e.g.*, United States v. Bd. of Educ. of Greene County, Miss., 332 F.2d 40, 46 (5th Cir. 1964) (affirming a decision involving a school board's refusal to rehire a black teacher who took part in voter registration activities); United States v. Edwards, 333 F.2d 575, 578-79 (5th Cir. 1964) (affirming a trial court's decision involving a physical attack on blacks who sought to register to vote).

discrimination."[98] Congress's passage of the VRA,[99] and in particular Section 11(b) of that legislation, made it clear that the government was not required to prove that the acts were purposefully discriminatory. Since the passage of Section 11(b), however, the federal government has rarely used this provision to pursue voter intimidation and attempts to use it as a means to prevent and deter voter intimidation have been largely unsuccessful.

A. Dormant Federal Statutes

In analyzing existing federal statutes and enforcement, neither clear definition nor authority exists for prosecuting the act of voter deception. In some instances, well-respected governmental authorities have said that the federal government lacks the authority to pursue deceptive practices.[100] Ambiguities remain in the federal law context regarding deceptive practices.[101] The justified focus on the twentieth-century issue of voter intimidation to allow access, and the twenty-first century focus on vote fraud in some instances to deny access, necessitates congressional and state legislative attention.

Additionally, 42 U.S.C. § 1971(b) and Section 11(b) of the VRA, as well as the

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98. During the House Hearings on passage of the VRA, then-Attorney General Katzenbach said: "There has been case after case of similar intimidation—beatings, arrests, lost jobs, lost credit, and other forms of pressure against Negroes who attempt to take the revolutionary step of registering to vote." *Voting Rights: Hearings on H.R. 6400 Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 9 (1965) (statement of Att'y Gen. Nicholas Katzenbach).

Attorney General Katzenbach also said that

> [p]erhaps the most serious inadequacy [of the existing statutes prohibiting voter intimidation] results from the practice of district courts to require the Government to carry a very onerous burden of proof of "purpose." Since many types of intimidation, particularly economic intimidation, involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective.

Id. at 11.

99. President Lyndon B. Johnson called the VRA of 1965, "one of the most monumental laws in the entire history of American freedom." DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 132 (1978) (citing PUBLIC PAPERS OF THE PRESIDENTS, LYNDON B. JOHNSON, 1965, at 840-43); *see also* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982); Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 (2006); *see generally* Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221 (D.D.C. 2008), *prob. juris. noted*, 129 S. Ct. 894 (mem.), *rev'd and remanded*, 129 S. Ct. 2504 (2009).

100. *See* CRAIG DONSANTO, FEDERAL PROSECUTION OF ELECTION OFFENSES 749, 795 (7th ed., 1689 PLI/Corp. 2008) (stating although some acts are "reprehensible" they are beyond the reach of federal statutes, such as "distributing inaccurate campaign literature").

101. For a discussion of election law statutes, see, for example, Pardo, *supra* note 78; David C. Rothschild & Benjamin J. Wolinsky, *Election Law Violations*, 46 AM. CRIM. L. REV. 391 (2009).

NVRA, statutes that the U.S. Department of Justice Civil Rights Division enforces, do not contain criminal penalties.[102] A major shortcoming lies in the lack of criminal penalties.

1. Federal Criminal Penalties and Enforcement.—The federal criminal statute falls far short of enforcement and meaningful penalties for voter intimidation and deception. PIN enforces criminal use of threats or violence to coerce voters in voter registration, voting or uses voter registration applications in a fraudulent manner.[103] However, PIN has not prosecuted persons for misleading or false information under this statute.[104]

PIN believes that a plausible vehicle for broad acts of voter suppression and more specific acts of intimidation prosecutions is 18 U.S.C. § 241, which considers it a felony to "conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him the Constitution or laws of the United States."[105]

In *United States v. Tobin*,[106] the federal government charged a Republican Party official with jamming phone lines in an effort to affect the hotly contested 2002 U.S. Senate election in New Hampshire.[107] The court found that 18 U.S.C. § 241 was applicable and imprisoned the official for three months.[108] This statute, however, has been rarely used in the voting context and only with varying

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102. Section 1971(c) authorizes the Attorney General to bring civil actions for "preventive relief" against violations of § 1971(b). 42 U.S.C. § 1971(c) (2006). Section 11(b) of the VRA does not include criminal penalties. *Id.* § 1973i(b).

103. *See* 18 U.S.C. § 241 (2006).

104. Most recently, PIN prosecuted a Republican operative in a voter suppression scam in New Hampshire using 18 U.S.C. § 241. United States v. Tobin, No. 04-CR-216-01-SM, 2005 WL 3199672 at *1, *3 (D.N.H. Nov. 30, 2005) (holding that a conspiracy to interfere with a person's right to vote violates 18 U.S.C. § 241).

105. 18 U.S.C. § 241. The Supreme Court has found that voting is a fundamental right. *See* Wesberry v. Sanders, 376 U.S. 1 (1964) (holding that apportionment of congressional districts so that single congressman represented from two to three times as many Fifth District voters as were represented by each of congressmen from other Georgia districts grossly discriminated against voters in Fifth District in violation of the constitutional requirement that representatives be chosen by people of the several states); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("[T]he right of suffrage is a fundamental matter in a free and democratic society. . . . any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

106. 2005 WL 3199672, at *1, *3 (holding that a conspiracy to interfere with a person's right to vote violates § 241).

107. Thomas B. Edsall, *GOP Official Faces Sentence in Phone-Jamming*, WASH. POST, May 17, 2006, at A10. One of the Republican Party's top priorities in 2002 was to retain the New Hampshire Senate seat. *Id.* Tobin, the Republican National Committee regional political director, was "[o]vercome by his desire for success in the election," he used his position to make the phone jamming scheme successful instead of stopping it. *Id.*

108. ALLEN RAYMOND, HOW TO RIG AN ELECTION: CONFESSIONS OF A REPUBLICAN OPERATIVE 236 (2008). The defendant, Allen Raymond chronicled his actions in a book. *Id.* at 1.

degrees of success.[109] Nonetheless, PIN believes that voter suppression infractions should be prosecuted and that 18 U.S.C. § 241 is the proper mechanism until Congress passes a statute that is more directly on point.[110] This focus, however, continues to ignore the act of voter deception as a prosecutable offense and threat to the democratic process.

Although a civil statute, the NVRA's provision, 42 U.S.C. § 1973gg-10(1), prohibits the fraudulent and intimidating acts surrounding the voter registration process and includes imprisonment and monetary fines as punishment.[111] But it does not include penalties for deceptive practices, such as anonymous leaflets that indicate the wrong date for the election.

2. Federal Civil Penalties and Enforcement.—In the civil law context, two federal statutes currently govern voter intimidation: 42 U.S.C. § 1971(b)[112] and

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109. *See* United States v. Classic, 313 U.S. 299, 309-10 (1941) (interpreting § 20 to apply to the deprivation of the constitutional rights of qualified voters to choose representatives in Congress).

110. *See* DONSANTO & SIMMONS, *supra* note 68, at 63 (arguing that "suppression schemes [represent] an important law enforcement priority, that such schemes should be aggressively investigated, and that, until Congress enacts a statute specifically criminalizing this type of conduct, 18 U.S.C. § 241 is the appropriate prosecutive tool by which to charge provable offenses.").

111. 42 U.S.C. § 1973gg-10(1) provides:

> A person, including an election official, who in any election for Federal office—
> (1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for—
> (A) registering to vote, or voting, or attempting to register or vote;
> (B) urging or aiding any person to register to vote, to vote, or to attempt to register or vote; or
> (C) exercising any right under this subchapter; or
> (2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by—
> (A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or
> (B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held, shall be fined in accordance with title 18 (which fines shall be paid into the general fund of the Treasury, miscellaneous receipts (pursuant to section 3302 of title 31), notwithstanding any other law), or imprisoned not more than 5 years, or both.

42 U.S.C. § 1973gg-10(a) (2006).

112. The bill that preceded these statutes and governed intimidation was the Hatch Act of 1939, which dealt with political activities of federal employees and also prohibited intimidation of voters in federal elections. DONSANTO & SIMMONS, *supra* note 68, at 57. The intimidation provision was a response to irregularities in the 1938 election, including economic pressure on participants in Works Progress Administration programs. Hatch Act of 1939: Information, *at* http://www.answers.com/topic/hatch-act-of-1939 (last visited Mar. 14, 2010). 42 U.S.C. § 1971(b) (2006) reads as follows:

Section 11(b) of the VRA.[113] These statutes give the government the ability to deter voter intimidation. The statutes' language gives prosecutors the potential to litigate against persons who interfere with the right to vote. But they have remained underutilized and leaves the purpose of the statutes unfulfilled and open to political interpretation.

In its present form, the VRA prohibits voter intimidation, but it does not include criminal penalties for such acts.[114] Moreover, other issues, such as giving false information or voting more than once, are criminalized in § 1973i(c)-(e) and other violations under § 1973.[115] Although § 1971(b) prohibits interfering with a constitutional right such as attempting to vote, it has been much more successful at other times, particularly in the Civil Rights era.[116] Conversely, Section 11(b) is rarely used and has remained highly unsuccessful.[117] The Department of Justice has brought only four lawsuits under Section 11(b) in the

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> No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

42 U.S.C. § 1971(b) (2006). Section 1971(c) authorizes the Attorney General to bring civil actions for "preventive relief" against violations of § 1971(b).

113. Section 11(b) of the VRA reads as follows:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any other person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate . . . .

42 U.S.C. § 1973i.

114. *Id.*

115. *See id.*

116. Early suits under § 1971(b) sought injunctive relief against persons who used economic and physical threats against eligible voters. For example, in *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 349-50 (E.D. La. 1965), the three-judge district court panel held that the defendants violated § 1971(b). The defendants admitted that they had engaged in economic coercion and other efforts to prevent blacks in Washington Parish from registering to vote. *Id.* at 337. The court rejected the defendants' contentions that § 1971(b) does not apply to private individuals and that the statute is unconstitutional. *Id.* at 349, 355. *See also* United States v. Chappell (sought and obtained injunctive relief against segregated voter lists); Bell v. Home (M.D. Ga. 1965) (sought and obtained injunctive relief against acts of intimidation, including the arrest of blacks who had refused to leave a "white" polling place).

117. *See* Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69, 117 n.290 (2003) (noting that section 11(b) prohibits intimidation by individuals but not by jurisdictions).

history of the VRA.[118] All were brought for various violations that are contemporaneously classified as voter suppression; most are pure voter intimidation cases and only one could arguably classify as a voter deception case.[119]

The more contemporary Section 11(b) cases are informative in ascertaining the Department's philosophy towards prosecuting under the statute, which the courts have interpreted as a voter intimidation statute because of its prohibition against threats.[120] The most recent cases involve the Department of Justice filing complaints against racial minorities.[121] The choice of enforcement is revealing about the impact on future enforcement of voter intimidation and deceptive practices. For example, in *United States v. Brown*, the U.S. Department of Justice, Civil Rights Division, Voting Section brought the first case pursuant to Section 2 of the VRA[122] on behalf of white voters in Noxubee, Mississippi.[123]

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118. The first, *United States v. Harvey*, 250 F. Supp. 219, 222 (E.D. La. 1966), was filed in 1965 and was unsuccessful. *Id.* at 237. The Department alleged that, in violation of Section 11(b) and Section 1971(b), the defendants terminated sharecropping and tenant-farming relationships with blacks who had registered to vote, evicted such persons from rental homes, and discharged them from salaried jobs. *Id.* at 222. Concluding that the intimidation statutes exceeded Congress' power and that, in any event, the Department had failed to prove intimidation, the court granted judgment for the defendants. *Id.* at 226, 237.

119. *Id.* at 221 (voter intimidation); United States v. N.C. Republican Party (voter deception); United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007) (voter intimidation), *aff'd*, 561 F.3d 420 (5th Cir. 2009); Complaint, United States v. New Black Panther Party for Self-Defense, No. 09-0065 (E.D. Pa. Jan. 7, 2009), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/BlackPanther-Complaint-1-7-09.pdf (voter intimidation).

120. *See, e.g.*, *Brown*, 494 F. Supp 440 (voter intimidation).

121. *Id.* (DOJ brought a Section 2 and Section 11(b) challenge against racial minorities for alleged voter intimidation); Complaint, United States v. New Black Panther Party for Self-Defense, No. 09-0065 (E.D. Pa. Jan. 7, 2009) (DOJ filed a voter intimidation challenge against members of the New Black Panther Party).

122. The VRA contains two primary enforcement provisions. Section 2 prohibits discrimination in voting based on race, color, language, or minority status. Section 5 requires specified jurisdictions to submit all of their voting administration changes to the Attorney General or U.S. District Court for the District of Columbia prior to implementation. Congress included a national prohibition against discrimination in voting in Section 2 of the Act. The provision imposes a prohibition against racial discrimination in any voting standard, practice or procedure, including redistricting plans. Under Section 2, "[p]laintiffs must demonstrate that . . . the devices result in unequal access to the electoral process." Thornburg v. Gingles, 478 U.S. 30, 46 (1986).

123. *Brown*, 494 F. Supp. 2d 422. The District Court judge noted that this was certainly "an unconventional, if not unprecedented use of the Voting Rights Act." *Id.* at 443. The court opined:

> [D]efendants proclaim it "preposterous" that the Justice Department—a Justice Department they maintain has for decades been wholly unresponsive to complaints of voting discrimination by black citizens—would have the temerity to come into this court claiming that blacks in Noxubee County, who were oppressed by the white establishment for 135 years and who finally gained the reins of power a mere 12 years

Under a cloud of criticism, the Department brought a voter intimidation lawsuit against African American defendants.[124] This was an interesting choice, because in most acts of voter intimidation and deception, African Americans and members of other minority communities are the victims, not the perpetrators.[125] In *Brown*,[126] the court found that the defendants had violated Section 2 of the VRA.[127] Regarding the Section 11(b) claim, the district court found that Brown's actions during a 2003 Democratic primary had "a racial element," but did not constitute a threat that affected the right to vote.[128]

George W. Bush's administration brought a second case against African Americans shortly after the 2008 elections, using its Section 11(b) authority that involved poll watchers in Philadelphia, Pennsylvania.[129] In *United States v. New Black Panther Party, MS*,[130] the Department alleged that members of the New Black Panther Party brandished weapons and made racial slurs at both black and white voters outside a polling place.[131] Among criticism,[132] the newly elected

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ago, have discriminated against whites in that county.

Id. at 480. The defendants further argued that white citizens in Noxubee County could not demonstrate the critical requirements under the VRA, including a history of official discrimination, under-representation in elections, discrimination in "education, employment or health," and an unresponsive government. *Id.* at 483. The defendants further argued that Section 2 was "being launched as a missile without an enemy." *Id.* at 480.

124. *See* Adam Nossiter, *U.S. Says Blacks in Mississippi Suppress White Vote*, N.Y. TIMES, Oct. 11, 2006, at A18, *available at* http://www.nytimes.com/2006/10/11/us/politics/11voting.html; Peter Whoriskey, *Alleged Voting Rights Violation with Twist Goes to Trial*, WASH. POST, Jan. 16, 2007, at 2, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/15/AR2007011501196.html.

125. LOGAN, *supra* note 15. The overwhelming accounts of voter intimidation and particularly voter deception target minority communities. *See supra* notes 15-19.

126. 561 F.3d 420.

127. *Id.* at 434-35.

128. United States v. Brown, 494 F. Supp. 2d 440, 477 n.56 (S.D. Miss. 2007), *aff'd*, 561 F.3d 4420 (5th Cir. 2009).

129. Press Release, Dep't of Just., Justice Department Seeks Injunction Against New Black Panther Party (Jan. 7, 2009), *available at* http://www.justice.gov/opa/pr/2009/January/09-crt-014.html.

130. United States v. New Black Panther Party for Self-Defense, No. 09-0065 (E.D. Pa. Jan. 7, 2009), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/BlkPants-Judgmt-5-18-09.pdf. In its complaint the Department alleged that the defendants violated Section 11(b) through "armed and uniformed personnel at the entrance to the polling location," "[t]he loud and open use of racial slurs," and essentially creating an "intimidating and threatening presence" outside the polls. Complaint at 4-5, United States v. New Black Panther Party for Self-Defense, No. 09-0065 (E.D. Pa. Jan. 7, 2009), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/BlackPanther-Complaint-1-7-09.pdf.

131. The members of the New Black Panther Party outside the polling place described themselves as "security" and "concerned citizens." Youtube.com, "Security" Patrols Stationed at Polling Places in Philly, http://www.youtube.com/watch?v=neGbKHyGuHU&feature=player_

administration decided not to pursue the case and dropped the charges against the defendants.[133] It is not clear that the New Black Panther Party members actually intimidated voters, particularly as the police allowed one member of the New Black Panther Party to remain at the polls.[134] Nonetheless, the presence of a weapon outside of a polling site could threaten or intimidate a voter from entering. The government's dismissal of this case either demonstrated its inability to prove the necessary elements of the statute (i.e., threats, intimidation, coercion) or a political decision not to prosecute. Regardless, the government's decision to pursue and abandon this case demonstrates the powerlessness of the statute in its present form.

The federal government has brought only one case under the civil enforcement statute that arguably involved intimidation and deception. The hotly contested 1990 U.S. Senate race involving incumbent Jesse Helms and challenger Harvey Gantt[135] was especially contentious and at times extremely race-based.[136] It is commonly held that Helms regained the lead in a faltering campaign when he aired an advertisement that played to the fears and prejudices of North Carolina citizens.[137]

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embedded. The police removed one member of the party who held a nightstick, but allowed a second member to remain. Stu Bykofsky, *Sometimes, Intimidation Is in Eye of Beholder*, PHIL. DAILY NEWS, June 8, 2009, Local, at 6.

132. Jerry Seper, *Career Lawyers Overruled on Voting Case*, WASH. TIMES, May 29, 2009, at A1, *available at* http://www.washingtontimes.com/news/2009/may/29/career-lawyers-overruled-on-voting-case/ (noting that career lawyers, who sought to pursue sanctions against the members of the New Black Panther Party, were overruled by political appointees). *See* Editorial, *Protecting Black Panthers; The Obama Administration Ignores Voter Intimidation*, WASH. TIMES, May 29, 2009, at A20 (arguing that the members' conduct was in clear violation of the VRA because the Act prohibits "any 'attempt to intimidate, threaten or coerce,' any voter or those aiding voters" and criticizing the Department of Justice for dropping such a "blatant intimidation" case).

133. Seper, *supra* note 132.

134. *See* Bykofsky, *supra* note 131.

135. Harvey Gantt was a civil rights pioneer. He was the first African American admitted to Clemson University in 1963, and he graduated with honors from Clemson and received a master's degree in city planning from the Massachusetts Institute of Technology. Harvey Gantt, NEWSOBSERVER.COM, http://projects.newsobserver.com/under_the_dome/profiles/harvey_gantt. He served as mayor of Charlotte, North Carolina from 1983 to 1987 and on the city council from 1974 to 1983. *Id.* He ran unsuccessfully for U.S. Senate against Jesse Helms in 1990 and in 1996. *Id.*

136. *Id.*

137. In the "White Hands" advertisement, the commercial begins with a white male—showing only his hands—opening a letter and then throwing it away. The announcer then says,

> You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications. You'll vote on this issue next Tuesday. For racial quotas, Harvey Gantt. Against racial quotas, Jesse Helms.

In a continuation of these tactics and an example of classic voter deception, predominately African American communities received 125,000 postcards containing misleading information on voter eligibility and threatening them with vote fraud prosecutions.[138] After the election, a Department of Justice lawsuit resulted in a consent decree prohibiting the state's Republican Party "from targeting voters based on their 'racial minority status,' and required it to obtain prior court approval for its anti-fraud activities."[139] The Department settled the case based on its authority to protect against race discrimination under Section 2 of the VRA, but arguably not under its authority contained within the civil penalties.[140]

The federal government's lack of enforcement of voter intimidation and its most recent application to traditional beneficiaries of the VRA are quite instructive. Department of Justice officials questioned whether Section 11(b) could apply to deceptive practices, such as the Senator Cardin example,[141] but the officials used the statute against black citizens, in the face of overwhelming evidence that vote intimidation is typically committed against minorities, not by them. Granted, the federal Section 11(b) cases did not involve anonymous actions or publications; however, the need to enjoin practices promulgated against minority communities that intimidate and deceive voters is evident. The choice and lack of enforcement of Section 11(b) and other statutes to address

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YouTube.com, Jesse Helms's "Hands" ad, http://www.youtube.com/watch?v=KIyewCdXMzk. After airing the "White Hands" political advertisement, Senator Helms moved up considerably in the polls and ultimately won the election. *See* ABC News Services, *Sen. Jesse Helms Dead at 86: Polarizing North Carolina Lawmaker Known as 'Senator No'*, July 4, 2008, http://abcnews.go.com/US/story?id=5309543&page=1.

138. Press Release, N.C. Democratic Party, North Carolina Democrats Announce Unprecedented Election Protection Program (Aug. 3, 2007), *available at* http://www.ncdp.org/north_carolina_democrats_election_protection; *see* U.S. ELECTION ASSISTANCE COMM'N, *supra* note 39, at 13-14 (defining election crimes to include dissemination of false information regarding eligibility to vote).

139. JUSTIN LEVITT & ANDREW ALLISON, REPORTED INSTANCES OF VOTER CAGING 3 (2007), *available at* http://www.brennancenter.org/pager-i/d/download_file_49609.pdf. Such direct mail marketing campaigns are also known as "vote caging" schemes, utilized to indicate potential vote challenges. Vote caging is

> a three-stage process designed to identify persons in another party or faction whose names are on a voter registration list, but whose legal qualification to vote is dubious, and then to challenge their qualification either before or on Election Day. Ostensibly, caging is an attempt to prevent voter fraud. In practice, it may have the effect of disenfranchising voters who are legitimately registered.

Chandler Davidson et al., *Vote Caging as a Republican Ballot Security Technique*, 34 WM. MITCHELL L. REV. 533, 537-38 (2008) (discussing voter deception through vote caging methods).

140. Although this case could serve as a classic voter intimidation or deception case, the case was brought and settled under a purposeful discrimination theory under Section 2 of the VRA.

141. *See* INTRODUCTION, *supra*. Samples of such flyers are available at NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 1.

other voter suppression tactics evidence the need for more protections. With only a few Section 11(b) cases in the history of the statute and a lack of a federal statute that unequivocally addresses deceptive practices, the impotence of the civil statutes and the indecision of the criminal statutes in their current configuration are clearly revealed. In fact, the government has yet to bring a successful intimidation case under the civil statute.[142]

B. State Voter Intimidation and Deceptive Practices Statutes

States have instituted an array of statutes seeking to address voter intimidation, fraud, and deception. Thirty-nine states have statutes that specifically bar some form of voter intimidation, deceptive practices, or both. Most laws can be divided into three categories, based on the type of false information that is outlawed. The first category of statutes outlaw the dissemination of false information regarding election administration, such as registration and polling site activity.[143] The second category outlaws false information on candidates or issues, such as making a false statement about a candidate or a proposition,[144] while the third category of statutes address both election administration and candidate or other substantive issues.[145] Of the thirty-nine states that have laws addressing some form of voter intimidation and deceptive practices, only nine states consider a violation of their voter intimidation statutes as a felony;[146]and only fifteen find the offender guilty of a

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142. *See* United States v. Brown, 494 F. Supp. 2d 440, 477 n.56 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009) (noting the government's lack of pursuit and triumph and that "the Government has given little attention to this claim, and stat[ing] that it has found no case in which plaintiffs have prevailed under this section").

143. *See, e.g.*, VA. CODE ANN. § 24.2-1005.1 (West 2007) (considering it a misdemeanor to knowingly communicate false election information to a registered voter about the time, date or place of voting and also prohibiting false information regarding a voter's polling site or registration status).

144. *See, e.g.*, WIS. STAT. ANN. § 12.05 (West 2004) (prohibiting "false representation[s] pertaining to a candidate or referendum which [are] intended . . . to affect voting at an election").

145. For example, Louisiana precludes the dissemination of any "oral, visual, or written material containing . . . a false statement about a candidate . . . or about a proposition." LA. REV. STAT. ANN. § 18:1463 (2004) as well as information regarding voting or registration. *Id.* §§ 18:1461, 18:1461.1. The parsing of various types of false information to election administration, candidates, and the like helps to ensure that these laws are not overbroad and consistent with the state's compelling interest. *See supra* Part II.B (discussing constitutional considerations).

146. Perhaps the most stringent state is South Carolina, which imposes a ten-year sentence of imprisonment and possibly a fine for a violation of its voter intimidation statute. The South Carolina statute reads:

> A person who, at any of the elections, general, special, or primary, in any city, town, ward, or polling precinct, threatens, mistreats, or abuses a voter with a view to control or intimidate him in the free exercise of his right of suffrage, is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more

misdemeanor.[147] Of those states that include penalties for intimidation, only five states include "fraud" in their statutes penalizing intimidation.[148] Only four states also penalize voter deception.[149]

On the issue of e-deception, a few states include laws that are broadly construed such that they may apply to the traditional means of deception *and* online voting deception.[150] The litany of statutes and their attributes leads at best to piecemeal enforcement.[151] In most cases, the intimidation or fraud cases are

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than ten years, or both.

S.C. CODE ANN. § 7-25-80 (1976).

147. The majority of states that impose penalties for voter intimidation only find offenders guilty of misdemeanors; most impose a class A misdemeanor. *See, e.g.*, ALA. CODE § 17-17-33 (1975) (class A misdemeanor for intimidation, threats, etc.); ARK. CODE ANN. § 7-1-103 (West 2010) (class A misdemeanor for intimidation, threats, etc.); TENN. CODE ANN. § 2-19-115 (West 2009) (class A misdemeanor for "force or threats"); VA. CODE ANN. § 24.2-607 (2006) (class 1 misdemeanor for any person who "hinder[s], intimidate[s] or interfere[s] with any qualified voter"). Delaware allows a civil action against the offender and allow the petitioner to recover $500. DEL. CODE ANN. tit. 15, § 5162 (West 2006).

148. *See* CAL. ELEC. CODE § 18573 (West 2003) (stating that a person is "guilty of a felony" if he or she "defrauds any voter at any election by deceiving and causing him or her to vote for a different person for any office than he or she intended or desired to vote for"); IDAHO CODE ANN. § 18-2305 (West 1972) (determining that "[a] person who . . . defrauds any elector . . . is guilty of a misdemeanor"); MD. CODE ANN. ELEC. LAW.§ 16-201 (2009) (maintaining that "[a] person may not willfully and knowingly [i]nfluence or attempt to influence a voter's decision through . . . fraud"); S.C. CODE § 7-25-190 (2009) (pronouncing that "[a] person . . . who by force, intimidation, deception, [or] fraud . . . controls the vote of any voter . . . is guilty of a felony"); W. VA. CODE ANN. § 3-9-10 (West 2002) (declaring that "[a]ny person who shall, by . . . fraud . . . prevent or attempt to prevent any . . . voter . . . from freely exercising his right of suffrage at any election" is guilty of a misdemeanor).

149. Florida, Illinois, Kansas, and Minnesota penalize voter deception. *See* FLA. STAT. ANN. § 104.0615 (West 2008) (including in the purview of the statute false information to induce or compel an individual to vote or refrain from voting); 10 ILL. COMP. STAT. ANN. 5/29-4 (West 2003) (penalizing "[a]ny person who, by . . . deception . . . knowingly prevents" another from voting or registering to vote); KAN. STAT. ANN. § 25-2415 (1974) (including the mailing or publishing of false information as proscribed voter intimidation); MINN. STAT. ANN. § 204C.035 (2006) (prohibiting a person from "knowingly deceiv[ing] another person" about election information).

150. *See, e.g.*, ALA. CODE § 17-17-38 (1975) (prohibiting "[a]ny person . . . by any . . . corrupt means, [from] attempt[ing] to influence any elector in giving his or her vote, deter[ring] the elector from giving the same, or disturb[ing] or hinder[ing] the elector in the free exercise of the right of suffrage"). For a comprehensive analysis of current laws and their applicability to online voter deception, see Common Cause, *supra* note 23.

151. *See, e.g.*, Kamins v. Bd. of Elections for D.C., 324 A.2d 187 (D.C. 1987) (finding that certain write-in voters should have been counted and remanded for other proceedings); Pabey v. Pastrick, 816 N.E.2d 1138, 1151 (Ind. 2004) (granting relief to plaintiff for proving "that a deliberate series of actions occurred"); Rogers v. Holder, 636 So. 2d 645 (Miss. 1994) (upholding election results despite known departures from absentee voting provisions).

brought, while the deceptive practices are allowed to continue without penalty or investigation.

Although most state voter intimidation statutes contain language similar to the federal statutes prohibiting intimidation, e.g., "[i]t shall be unlawful . . . to intimidate, threaten, or coerce,"[152] the best-structured statutes that would encompass deception do not limit the illegal actions to those containing threats. Those statutes highlight the intentional falsehood to manipulate voters regarding an election administration matter, such as the date of the election. Nonetheless, state statutes that specifically address deceptive practices can serve as a model for other legislation. A Kansas statute that became effective in 2001, serves as a model for states seeking to encompass the distinct instances of voter suppression, including deception. Statutes that include criminal or harsh civil penalties can have a deterrent effect and lessen the impact of these practices.

Whether on the state or federal level, the need for a more precise criminalization of deceptive practices is warranted. Most statutes addressing some form of "election crimes" ignore the impact and harm that voter deception causes. Although some statutes exist for either voter fraud or intimidation, few comprehensive laws address documented and resurgent deceptive practices. Thus, acts of voter dilution can best be addressed through vigorous enforcement and more inclusive interpretation of existing statutes.

III. ENDING DECEPTION

The history of election regulation in America "reveals a persistent battle against two evils: voter intimidation and election fraud."[153] Voter intimidation and deceptive practices have in large part not been regulated or litigated in the United States.[154] Any revisions or new regulations must adequately include constitutional considerations that secure and protect the right to vote. Although the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides the authority to combat voter deception, Congress should also strengthen existing statutes to address deceptive practices.

A. Equal Protection Clause

Governments have a significant interest in protecting their citizens from deceptive practices. The U.S. Supreme Court has found compelling interests in

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152. *See, e.g.*, ALA. CODE § 17-17-33 (1975) (effective January 1, 2007) (barring intimidation and threats for the election of "any candidate for state or local office or any other proposition at any election"). The statute also qualifies intimidation as a class A misdemeanor. *Id.*

153. Burson v. Freeman, 504 U.S. 191, 206-10 (1992) (holding that a Tennessee statute prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to any polling place was narrowly tailored to serve a compelling state interest in preventing voter intimidation and election fraud, as required by the First Amendment).

154. *See supra* Part II.A.

laws that sought to prevent voter intimidation[155] and voter fraud.[156] The right to vote and participate in the political process free from intimidation and fraud is strikingly similar to issues surrounding deceptive practices. Voting is different from other rights in a democratic society, in that the right to vote and to do so without interference is a linchpin of our democracy.[157] Accordingly, efforts to distort, mislead, connive, and deceive are worthy of federal constitutional protections. The Equal Protection Clause of the Fourteenth Amendment, as well as various existing federal and state statutes, assist the government in its pursuit of free access to the franchise.

In *Crawford v. Marion County*,[158] the U.S. Supreme Court found that Indiana had two legitimate reasons for adopting a voter identification law that limited the number of acceptable forms of identification to government-issued photo identifications.[159] The Court found that Indiana's desire to deter and detect voter fraud and its interest in promoting voter confidence were sufficient to find the voter identification statute constitutional.[160] These ideals are paramount in the need to provide governmental protection against deceptive practices. Governmental entities possess a need to deter and detect voter deception and the lack of enforcement of deceptive practices adversely affects voter confidence, particularly in incidents such as the Franklin County, Ohio, flyer that appeared to have the stamp of a legitimate governmental office.[161] These kinds of acts tend to cause voters to question the integrity of the electoral process. Regarding public confidence, the *Crawford* Court found that public confidence "encourage[d] citizen participation in the democratic process."[162]

B. First Amendment Concerns

Although an Equal Protection argument exists for persistent vigilance

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155. *See Burson*, 504 U.S. at 206.

156. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1623 (2008) (holding that purported state interests for an Indiana statute requiring government-issued photo identification to vote were sufficient to justify the limitation imposed on voters).

157. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (declaring that "the political franchise of voting is . . . regarded as a fundamental political right, because [it is] preservative of all rights").

158. 128 S. Ct. 1610 (2008).

159. *Id.* at 1616-17.

160. *Crawford*, 128 S. Ct. at 1617, 1624. Each of Indiana's asserted interests is unquestionably relevant to its interest in protecting the integrity and reliability of the electoral process. *See id.* at 1617 (noting that the opponents of the law did not "question the legitimacy of the interests the State has identified").

161. *See supra* Part I.A.

162. *Crawford*, 128 S. Ct. at 1620 (holding that state's interests identified as justifications for Indiana statute requiring government-issued photo identification to vote were sufficient to justify any limitation imposed on voters). Indiana's interest in protecting public confidence in elections, although closely related to its interest in preventing voter fraud, has independent significance because such confidence encourages citizen participation in the democratic process.

regarding voter deception, other constitutional constraints must also be considered. The Supreme Court has held that "[t]he freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state."[163]

In considering voter intimidation and deceptive practices, the fundamental right to vote and political speech are firmly juxtaposed. This juxtaposition requires balancing the right to vote with free speech and must be considered when addressing the dearth of all-inclusive voter suppression legislation. In constructing and strengthening state and federal legislation, one must not only consider the rights and freedoms of the affected citizenry, but also the rights of the deceiver.

1. First Amendment and Political Speech.—The First Amendment of the U.S. Constitution protects the right to speak freely.[164] This right to speak freely, however, should not include the right to speak falsely with intent to impair another's rights. A major purpose of the First Amendment is to protect "the free discussion of governmental affairs."[165] The Supreme Court has also noted, "For speech concerning public affairs is more than self-expression; it is the essence of self-government."[166] Freedom of expression is at the root of our participatory democracy.[167] The First Amendment serves the greater purpose of promoting a democratic government and serves the people's interest in having the information they need to enable self-government.[168] Historically, the First Amendment has

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163. Thornhill v. Alabama, 310 U.S. 88, 95, 101-02 (1940) (citations omitted) (noting that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment").

164. U.S. CONST. amend. I (providing "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"). The Fourteenth Amendment to the U.S. Constitution makes the First Amendment applicable to the states. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).

165. Mills v. Alabama, 384 U.S. 214, 218, 220 (1966) (holding that the Alabama Corrupt Practices Act as providing criminal penalties for publication of newspaper editorial on election day urging people to vote a certain way on specific issues violated the constitutional protection of free speech and press).

166. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (holding that the statute is unconstitutional as punishing false statements against public officials 1) if made with ill will without regard to whether they were made with knowledge of their falsity or in reckless disregard of whether they are true or false or 2) if not made in reasonable belief of their truth).

167. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640-41 (1994) (holding that people should decide for themselves "the ideas and beliefs deserving of expression, consideration, and adherence" and noting that "[o]ur political system and cultural life rest upon this ideal").

168. Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on* First National

"preserve[d] an uninhibited marketplace of ideas in which truth will ultimately prevail."[169] The First Amendment protections are paramount on issues involving political debate.[170]

For these reasons, the Supreme Court has continued to protect freedom of political speech[171] and upholds statutes that affect this fundamental right only if such restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[172]

The Supreme Court defines core speech protected under the First Amendment as "both the expression of a desire for political change and a discussion of the merits of the proposed change."[173] In limiting political speech, the legislative body "must . . . be prepared . . . to articulate and support its argument with a reasoned and substantial basis demonstrating the link between the regulation and the asserted governmental interest."[174]

The Supreme Court has found various expressions to be protected political speech, inter alia, the right to peaceably assemble,[175] the right to criticize

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Bank of Boston v. Bellotti, 59 S. CAL. L. REV. 1227, 1238, 1267, 1269 (1986) (arguing that in *Bellotti*, "the Court confirmed its discovery that commercial speech is not unprotected by the [F]irst [A]mendment and announced a novel doctrine that corporate speech is not unprotected by the [F]irst [A]mendment").

169. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390, 400-01 (1969) (holding that the FCC's order requiring that a person who is attacked on the air receive the opportunity to rebut was authorized by Congress and enhanced freedom of speech under the First Amendment rather than infringing this right).

170. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (finding that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office").

171. This protection applies to written materials and verbal communications. *See* Lamont v. Postmaster Gen., 381 U.S. 301, 302, 305 (1965) (finding a statute unconstitutional that requires the post office department to detain and destroy unsealed mail from foreign countries that is determined to be communist political propaganda unless addressee returns a reply card indicating his desire to receive such piece of mail).

172. United States v. Grace, 461 U.S. 171, 177, 183 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983)) (holding that statute denying "'display' of any flag, banner, or device designed or adapted to bring public notice to a party, organization, or movement" in or on the grounds of the Supreme Court building was unconstitutional because it could not be justified as a reasonable place provision).

173. Meyer v. Grant, 486 U.S. 414, 421-22, 428 (1988) (holding that a prohibition against paying circulators violated the First Amendment).

174. Mitchell v. Comm'n on Adult Entm't Establishments of Del., 10 F.3d 123, 132 (3d Cir. 1993) (citation omitted).

175. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980) (indicating that "[p]eople assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may 'assembl[e] for any lawful purpose'") (quoting Hague v. CIO, 307 U.S. 496, 519 (1939)).

government officials,[176] campaign finance,[177] signage,[178] circulating petitions for signatures[179] with limited regard for truth,[180] and speech regarding the American flag.[181] Not all speech is protected, including some political speech, e.g., false commercial speech,[182] electioneering within a certain distance of an entrance to a polling place on Election Day,[183] and destroying secret service certificates.[184]

The Supreme Court has also noted that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[185] A statute is suspect under content-

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176. Bond v. Floyd, 385 U.S. 116, 132, 136-37 (1966) (right to oppose national foreign policy and other governmental actions or criticize government officials).

177. Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 440 (2001) (concluding that "[s]pending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association"); *see also* Buckley v. Valeo, 424 U.S. 1, 44 (1976) (holding that provisions limiting individual contributions to campaigns were constitutional despite First Amendment objections).

178. Sambo's of Ohio, Inc. v. City Council of Toledo, 466 F. Supp. 177, 179 (1979) (noting that communication by signs and posters is considered to be "a pure matter of speech").

179. Meyer v. Grant, 486 U.S. 414, 421 (1988) ("The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.").

180. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth-whether administered by judges, juries, or administrative officials-and especially one that puts the burden of proving truth on the speaker.").

181. The Court has upheld decisions recognizing the communicative nature of conduct relating to flags, including attaching a peace sign to the flag, refusing to salute the flag, and displaying a red flag. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989) (citing Spence v. Washington, 418 U.S. 405, 409-10 (1974)) (upholding attaching peace flag to sign); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632, 636 (1943) (finding that refusing to salute the flag is constitutionally protected); Stromberg v. California, 283 U.S. 359, 368-70 (1931) (finding that displaying a red flag is constitutionally protected).

182. United States v. Bell, 414 F.3d 474, 479-80 (2005) ("The threshold inquiry is whether the commercial speech involves unlawful activity or is misleading.")

183. Burson v. Freeman, 504 U.S. 191, 206, 211 (1992). In *Burson*, the Court recognized that the exercise of free speech rights conflicts with the fundamental right to cast a ballot in an election free from intimidation and fraud. *Id.* at 211. Given the conflict between these two rights, the Court held that "requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise." *Id.*

184. United States v. O'Brien, 391 U.S. 367, 375 (1968). The Court held that "[a] law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records." *Id.*

185. Regan v. Time, Inc., 468 U.S. 641, 648-49, 659 (1984) (holding that the purpose requirement contained in a statute that regulated publication or production of illustrations of federal currency was unconstitutional).

based scrutiny if it "threatens to suppress the expression of particular ideas or viewpoints."[186] But a statute is suspect under content-neutral scrutiny when it is "intended to serve purposes unrelated to the content of the regulated speech, despite their incidental effects on some speakers but not others."[187]

A statute similar to the one used in Kansas serves as an example of content-neutral nondiscriminatory regulation on political speech. Indeed, the Kansas statute provides a complete description of voter deception, including electronic deception. This statute makes it a crime to intimidate, threaten, coerce, or attempt to intimidate "for the purpose of interfering with the right . . . to vote" and specifically outlaws deceptive practices by criminalizing "mailing, publishing, broadcasting, telephoning, or transmitting by any means false information."[188] It is sufficiently broad, but not unduly burdensome or vague. It specifically outlaws certain practices that are generally deemed voter suppression, and it also specifically identifies actions that constitute voter deception. The statute is limited in scope and addresses the state's need to protect its citizens from voter deception.

2. Political Speech and Anonymity.—The anonymous nature of voter deception makes it difficult to prosecute. Moreover, the advent of electronic deception exacerbates this difficulty.[189] The Constitution protects the ability to remain anonymous[190] but does not protect against some false speech,[191] while protecting others.[192] For example, it can protect a candidate's ability to stretch the truth, but no such protection exists for intentionally distributing false political

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186. Leathers v. Medlock, 499 U.S. 439, 443, 447 (1991) (holding that Arkansas's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate First Amendment).

187. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 121-22 n.* (1991).

188. KAN. STAT. ANN. § 25-2415 (2000). Kansas defines voter intimidation as threats, coercion or inter alia, publishing false information, which is probably the most closely targeted statute that addresses voter deception. *See id.*

189. *See generally* Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497 (2009) (discussing the difficulty in pursuing hate speech conducted via the Internet).

190. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

191. United States v. Bell, 414 F.3d 474, 480 (2005) ("The threshold inquiry is whether the commercial speech involves unlawful activity or is misleading.").

192. The Court will protect a candidate's promise to the electorate. See *Brown v. Hartlage*, 456 U.S. 45, 53, 55 (1982), which holds:

> The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

Id. at 53 (quoting Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)).

information.

Although the Supreme Court has prescribed protections to allow for political privacy in publishing material for public consumption and in developing legislation to counter deceptive practices, legislators must consider the nature of the actions that regularly involve the distribution of anonymous political literature. The Supreme Court has held, "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority."[193]

McIntyre v. Ohio Elections Commission demonstrates how the dissemination of knowingly false information differs from expressing one's political opinion.[194] The Court noted the importance of anonymous political literature[195] and the state's authority to limit the right to free speech to protect against false or misleading information and fraud.[196] The Court determined that the proper analysis involved the application of "'exacting scrutiny' and [would] . . . uphold the restriction only if it is narrowly tailored to serve an overriding state interest."[197]

Laws requiring identification of an author on political literature were primarily developed to protect citizens and enable them to assess the information's validity and integrity.[198] But preventative measures must not come at the expense of eligible voters and should not involve efforts to outwit voters. The Supreme Court has found that voter intimidation severely burdens on the right to vote and efforts to prevent intimidation must involve a compelling state interest.[199]

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193. *McIntyre*, 514 U.S. at 357.

194. The Supreme Court reviewed Ohio's blanket prohibition against distributing anonymous campaign literature. The Court considered whether the promotion was constitutional as applied to the plaintiff's distribution of unsigned flyers opposing a school tax. *Id.* at 337-38, 340.

195. The Court noted, "'Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.'" *Id.* at 341 (quoting Talley v. California, 362 U.S. 60, 64 (1960)).

196. *See id.* at 348; *see also* Rachel J. Grabow, Note, McIntyre v. Ohio Elections Commission: *Protecting the Freedom of Speech or Damaging the Electoral Process?*, 46 CATH. U. L. REV. 565, 570 (1997) (detailing the First Amendment case law that addresses anonymous speech and assesses the right to distribute anonymous literature under the Supreme Court's First Amendment rulings); Note, *Gutter Politics and the First Amendment*, 6 VAL. U.L. REV. 185, 198 (1972); Erika King, Comment, *Anonymous Campaign Literature and the First Amendment*, 21 N.C. CENT. L.J. 144 (1995).

197. *McIntyre*, 514 U.S. at 347.

198. *See* Grabow, *supra* note 196, at 583-85 (indicating that identification statutes were often held valid because of the state's interests "in facilitating the flow of information to the public and maintaining the civility and integrity of the electoral process").

199. *See* Burson v. Freeman, 504 U.S. 191, 206 (1992). In *Burson*, the Court addressed whether Tennessee's statute prohibiting the distribution of campaign paraphernalia or soliciting votes within one hundred feet of the polling place violated the First and Fourteenth Amendments.

Voter deception often arises from false information printed anonymously with no indication of the true author or distributor.[200] The deceptive information also may be printed with seemingly official seal from a governmental agency.[201] The documents could credibly be considered "anonymous leaflets,"[202] which the Supreme Court has decided are afforded some constitutional protections.

The state needs to lessen the tensions between voter intimidation, voter fraud, and other measures that undermine voter confidence, like voter deception.[203] Additionally, the Constitution places even broader limits on deceptive practices. The state has a compelling interest in ensuring that information regarding the time, place, and manner of elections and voter eligibility are accurately communicated. Protecting the accuracy of these statements to preserve the integrity of the franchise and ensure access to voting is a compelling state interest. Although political speech is strongly encouraged in this democratic society, the Supreme Court has carved out a restriction on that speech where the state is attempting to protect against harmful false information. Clearly, no right exists for distributing false information that addresses the time, place, and manner of elections, but just as clearly, no penalties exist.

3. Contrasting Campaign Finance as Speech.—The anonymous nature of voter intimidation and deceptive acts and the protections provided against those acts lie in stark contrast to campaign finance laws, where a contributor's identity is required under federal statute.[204] For example, a primary challenge in enforcing existing voter intimidation and deceptive practices laws is the difficulty in identifying the culprit.[205] In many instances, political and Election Day pamphlets are required to include some identifying information.[206] Courts have found that the requirement to include identifying information within the province of the First Amendment is compelling, as was the state's interest in addressing voter fraud and promoting the ability to investigate false claims.[207]

Id. The Court found that the legislation passed constitutional muster. *Id.* at 211.

200. *See* Howard Libit & Tim Craig, *Politicking Heats Up as Election Day Nears*, BALT. SUN, Nov. 4, 2002, at 1A; Eric Siegel, *Amid Stir, Voters Stream to Polls*, BALT. SUN, Nov, 6, 2002, at 27A. A flyer was distributed in Pennsylvania falsely indicating that Republicans would vote on November 2 and Democrats would vote on November 3 to cut down on lines. NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 1, at 1.

201. *See* NATIONAL CAMPAIGN FOR FAIR ELECTIONS, *supra* note 1.

202. *McIntyre*, 514 U.S. at 350.

203. The Court has also found that states have a compelling interest in preventing voter fraud and intimidation. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1617, 1624 (2008).

204. *See, e.g.*, 2 U.S.C. § 431 (2006). Federal campaign finance laws regulate the money spent by political actors to influence federal campaigns.

205. *See supra* Part III.B.2.

206. Some states require that the sponsor of the political literature be identified. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 126 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

207. *See* Seymour v. Elections Enforcement Comm'n, 762 A.2d 880, 885 (Conn. 2000).

Much has been written about First Amendment rights and campaign finance.[208] In the landmark case *Buckley v. Valeo*,[209] the Supreme Court addressed whether restrictions on campaign contributions and expenditures, inter alia, violated free speech.[210] The Court ruled that the restrictions on expenditure limits

> necessarily reduce[d] the quantity of expression by restricting the number of issues discussed . . . . It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions . . . limit political expression "at the core of our electoral process and of First Amendment freedoms."[211]

Consequently, the lack of attention to the perennial occurrence in the minority community and the lack of protection rise in sharp contrast to the well-documented and legislated campaign finance rules barring anonymous political literature. Indeed, any communications, published media or electronic media, endorsing or criticizing a candidate must meet strict restrictions, including acknowledging the source responsible for the information.[212]

The First Amendment does not require identification in most political speech.[213] The false, misleading political speech involved in voter deception does not fall within this constitutional protection. Governments have a compelling interest in preventing voter deception and can construct laws that are narrowly tailored to meet those goals. The presence of deceptive practices and intimidation seeks to quiet the voices of voters. Statutes must protect the ability to challenge and correct voter suppression activities.[214] Legislation addressing

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208. *See, e.g.*, Yasmin Dawood, *Democracy, Power, and the Supreme Court: Campaign Finance Reform in a Comparative Context*, 4 INT'L J. CONST. L. 269 (2006); Candice J. Nelson, *Problems in the Laboratories*, 2 ELECT. L.J. 403 (2003) (reviewing MONEY, POLITICS AND CAMPAIGN FINANCE REFORM LAW IN THE STATES (David Schultz ed., 2002)); Christopher J. Ayers, Comment, Perry v. Bartlett*: A Preliminary Test for Campaign Finance Reform*, 79 N.C. L. REV. 1788 (2001).

209. 424 U.S. 1 (1976).

210. The case centered on interpretations of the Federal Election Campaign Act, and the Court found that provisions limiting individual contributions to campaigns were constitutional despite First Amendment objections. *Id.* at 35.

211. *Id.* at 19, 39 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

212. I.R.C. § 501(c)(4)(A) ("Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.").

213. McIntyre v. Ohio Elections Comm'n, 514 U.S. 354, 357 (1995).

214. Voter intimidation undermines not only an individual's ability to participate in the electoral process but also affects group right to access the ballot. Voting is in large part a group right. In traditional electoral schemes, such as one person, one vote cases, courts determine the

voter deception falls squarely within constitutional parameters for restrictions on political speech. The First Amendment does not protect one's ability to lie or obstruct the democratic process. States must narrowly tailor their laws to address the distribution of misleading fraudulent information and protect citizens' right to speak freely.

C. Election Clause Powers

Governments have the power to legislate and restrict political speech. Although laws exist, the patchwork of applicable language and lack of penalties require strengthening and, in some instances, creating laws to address these actions. Despite the government's relative inaction or questionable actions in enforcing voter intimidation statutes, Congress is keenly stationed to provide protections against the knowing propagation of false election materials and has the constitutional authority to do so.[215] Notwithstanding the states' authority to develop election administration laws governing the time, place, and manner of elections, Congress maintains authority to make or alter the states' regulations for the election of federal offices.[216] Recent cases under the Elections Clause reinforce Congress's broad authority to regulate all aspects of the federal officials election.[217]

Congress's ability to use its Elections Clause power to "protect voters" from false information in federal elections is clear.[218] As the Supreme Court held in *Burson v. Freeman*,[219] the states have "a compelling interest in protecting voters from confusion and undue influence" and in safeguarding "the integrity of its election process."[220] Consequently, Congress has the authority to act under either

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right as related to a particular group. *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2282 n.30 (1998) (arguing that one person, one vote cases "should be viewed as cases about group political power . . . rather than purely about individual rights").

215. Congress has the power to regulate elections under the Elections Clause of the U.S. Constitution. U.S. CONST. art. I, § 4, cl. 1 (specifying that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators").

216. Congress can regulate the elections of Representatives and Senators. *See, e.g.*, United States v. Gradwell, 243 U.S. 476, 482 (1917); *Ex parte* Siebold, 100 U.S. 371, 383-84 (1879); United States v. Manning, 215 F. Supp. 272, 286-87 (W.D. La. 1963); Commonwealth *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 693-94 (Ky. Ct. App. 1944).

217. Cook v. Gralike, 531 U.S. 510, 523-24 (2001) (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)) (finding that the Elections Clause "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns'").

218. *See* Ass'n of Cmty. Org. for Reform Now v. Miller, 129 F.3d 833, 838 (6th Cir. 1997).

219. 504 U.S. 191 (1992).

220. *Id.* at 199 (quoting Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 228-29,

its Elections Clause or other constitutional powers to protect its citizens from voter deception.

IV. A LEGISLATIVE RESPONSE

The Supreme Court stated that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[221] Likewise, voter suppression affects groups—racial, ethnic or language minorities—and the freedom to participate without restraint in the democratic process. Groups' ability to vote is thwarted when deceptive practices and other suppressive measures are allowed to continue without penalty. Congress can use its constitutional authority to address the current inequities in the lack of enforcement regarding voter deception.

The Supreme Court has held, "the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication."[222] The nature of voter deception, i.e., anonymity, targeting racial and language minorities, and intentionally distributing false information in an attempt to deter targeted voters from the polls, all contribute to the need for better statutory construction and enforcement. The "right to vote freely for the candidate of one's choice is of the essence of a democratic society."[223] Connivery, falsehoods, and misleading voters thwart and negate those freedoms.

The present voter intimidation and deceptive practices statutes are dramatically underperforming. Policy reasons for addressing the weaknesses of the federal statutes—such as allowing unfettered access to the electoral process, providing accurate information to voters, inspiring voter confidence, and ultimately promoting fundamental democratic ideals—also continue to exist. Although recognizing its authority to do so under the Fourteenth Amendment and other applicable constitutional amendments, Congress must either strengthen existing statutes or adopt new legislation that covers the breadth of new millennium attempts to intimidate and deceive voters.

The lack of clarity and enforcement illustrates the need for legislation that clearly defines deceptive practices and develops mechanisms to ensure that such acts are investigated and that legislation contains appropriate penalties. The most important principles to consider are whether the person or party intentionally distributed false information regarding the time, place, and manner of an election or falsely described voter eligibility. A thorough statute should also contain extraordinary penalties if the distribution was knowingly disseminated through a political party affiliation, campaign, or candidate. In this instance, conspiracy

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231 (1989)).

221. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

222. *Burson*, 504 U.S. at 197 (citation omitted).

223. *Id.* at 199 (citation omitted).

principles should apply. Moreover, any voter suppression statute should contain both a private right of action and civil and criminal penalties. In addition, if the government opts to impose separate laws for voter deception, where the misinformation included threats of incarceration or deportation, prosecutors should also charge the perpetrators under applicable voter intimidation statutes.[224]

A more focused voter deception statute need not include a requirement of racial or purposeful discrimination. It should, however, include accelerated penalties for evidence that the illegal practice targeted a particular racial, ethnic, or language group. It is much more difficult to prove that an act of violence was precipitated with thoughts of racial animus or hatred than proving that an individual knowingly disseminate false information related to the voting process. If a purposeful component is required, most perpetrators would argue that the distribution was based on political affiliation instead of racial identity.[225] The mere act of purposefully distributing false information should satisfy any statute. The government should implement a tiered system to ensure that penalties will deter deceptive practices.

A. A Proactive Approach

Any attempt at fashioning anti-voter deception legislation must include a proactive approach to addressing and correcting the misinformation. The government's approach must contain both proactive and reactive components to ensure that citizens' ability to participate in the political process is not diminished. Although it has not traditionally served in the capacity as educator, in the deceptive practices context, governmental agencies must correct misinformation in a timely manner in order to limit its impact on the affected community.

Currently, no statute or administrative regulation requires the government to provide corrective information. Such a requirement would constitute a proactive approach to governing and election administration. In comparison to regulation and protection in areas such as food and product safety, the government allows voter deception to linger unanswered. The federal government transmits information on food safety and product liability to curb the harm to the general public,[226] and the same should occur for the fundamental act of voting. When

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224. The federal government could utilize 42 U.S.C. 1971(b) (2006) or 18 U.S.C. 594 (2006). *See supra* notes 97-97, 102 and accompanying text. States can utilize their broadly written statutes that contain an intent component as well as the presence of threats in the absence of specific legislation. *See supra* Part II.

225. This type of response has been raised in redistricting cases. *See e.g.*, Georgia v. Ashcroft, 539 U.S. 461, 469-70 (2003) (involving state legislators attempting to reapportion partisan districts and increase minority voting strength).

226. *See generally* U.S. Consumer Product Safety Comm., Recalls and Product Safety News, http://www.cpsc.gov/cpscpub/prerel/prerel.html (last visited Oct. 10, 2009). If the federal government can employ a process for notifying citizens of problems with food, toys and other consumer products, it can develop a similar notification process for voter suppression and

voter suppression occurs, the federal or state government, or both, should have a central office that receives such information at the state and federal levels and provides corrected information to the public, especially the affected community. Some states have already seen it as their responsibility to correct misinformation about the time, place, and manner of elections.[227] The federal government should use websites, toll-free numbers, press releases, and other means to address deceptive voter practices. Additionally, federal agencies have been slow to respond to false voter information. The government should utilize state agencies and local media to develop public service announcements that warn of the distribution of false election information in the locale and provide the correct information to insure that the democratic process is not contaminated.

Moreover, the federal government has the components necessary to engage in a regular voter education program through the use of existing laws. For example, the NVRA[228] requires designated agencies,[229] such as the Department of Motor Vehicles, social services agencies, libraries, and others, to ask clients if they would like to register to vote.[230] But registering is merely the first important step in realizing one's electoral potential. The federal government must take the next step and require those agencies designated under the NVRA to provide basic voter education information through signage and state-generated brochures.[231] States should also require designated agencies to provide clients

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correcting and exposing misinformation.

227. *See* Donna Marie Owens, *Election Officials Vigilant Over Voter Intimidation, Suppression*, Oct. 27, 2008, http://www.publicbroadcasting.net/wesm/news.newsmain/article/0/0/1398250/WESM.LocalRegional.News/Election.Officals.Vigilant.Over.Voter.Intimidation.Suppression (Maryland Attorney General Doug Gansler announced that citizens in predominately African-American neighborhoods had received flyers that said, "If you owe back child support or you owe parking tickets or you're an immigrant, you may be arrested, if you come to vote on Election Day."); *see also* MD. ATT'Y GEN. OFF., REPORT ON THE ATTORNEY GENERAL'S TASK FORCE ON VOTING IRREGULARITIES (2008), http://www.oag.state.md.us/Reports/VotingTaskForceRepor4_28.pdf.

228. 42 U.S.C. § 1973gg-1 (2006); *see also supra* note 8.

229. *Id.* § 1973gg-5 (requiring that "[e]ach state shall designate agencies" where voters can register to vote and allowing the state to include "public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and offices not described in paragraph (2)(B) that provide services to persons with disabilities" to be places where people can register to vote).

230. *See supra* note 7. The NVRA has met much criticism as an under-utilized statute. Critics have also argued that the Department of Justice—the statute's primary enforcer—has in past administrations left many portions of the Act unenforced and thus has left thousands of citizens unregistered. *See, e.g.*, Steve Carbo et al., *Ten Years Later: A Promise Unfulfilled; The National Voter Registration Act in Public Assistance Agencies, 1995-2005*, DEMOS, July 2005 (Nonprofit advocacy groups Demos, ACORN, and Project Vote found that most public assistance agencies did not incorporate voter registration into their services as the NVRA requires.).

231. The proposed legislation proposed in this Article would also require state election agencies to supply NVRA-designated agencies with various information regarding the time, place

with information from the state's election official regarding primary and general election dates, as well as where to find additional information about the proper polling place.

Much misinformation centers on citizens receiving information containing the wrong date for an election. Each NVRA-designated agency and other election-related agencies could advertise primary and general election day information. They could also provide citizens with clear information about the methods of voting, i.e., absentee, early voting, election day procedures, and provisional ballots, which directly prevent and address deceptive practices as well as promote public participation and confidence. Accordingly, the government should encourage and inform its citizens about election day occurrences and dispel any myths prior to the election relating to eligibility, time, place, and manner requirements for casting a ballot. Once the government receives a credible report regarding the distribution of false information, it must act expeditiously to correct that information.

B. Private Right of Action

Any legislation that addresses deceptive acts must include a private right of action. Wronged individuals or groups should have the ability to pursue legal action in order to deter future occurrences. In most other contexts, such as product liability or food safety, the consumer is allowed to pursue legal action against a manufacturer or producer.[232] The federal government has created the Consumer Protection Agency, which is responsible for protecting consumers from, inter alia, false advertising, and faulty products. In the voting context, citizens currently do not have an opportunity to litigate wrongs perpetrated against them for deceptive acts.

With this private right of action, the statute should also allow plaintiffs to recover costs and attorney fees. A person who is dissuaded from voting via this misinformation for fear that she is ineligible or believes the document originated from a governmental agency has been defrauded of an opportunity to exercise the

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and manner of voting. For example, Section 203 of the VRA requires covered jurisdictions to provide all election-related materials in languages covered under Section 203. 42 U.S.C. § 1973aa-1a(b) 2006). States must provide identical information in both English and the covered language, e.g., Spanish or Hmong. *Id.* Here, as opposed to providing that information only at the voter registrar or other election-related office, the information would also disseminate to social services agencies. As with Section 203, the state governments should also provide a toll-free hotline to report deceptive acts. Once the state receives and verifies the information and finds it credible, it must begin to broadcast corrected information. Additionally, any signage or brochures must include websites including appropriate contact information where citizens can report deceptive acts and provide copies of deceptive documents.

232. *See* IND. CODE § 34-20-2-1 (2008); MICH. COMP. LAWS ANN. § 600.2947 (West 2009); OHIO REV. CODE ANN. § 2305.10 (West 2009); *see also In re* Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002); *In re* ConAgra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689 (N.D. Ga. 2008); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988).

fundamental right to participate in the democratic process and should have the ability to pursue legal actions against the responsible individuals.

C. Criminal and Civil Penalties

Disseminating information to a protected racial group with the intent to suppress votes is an overt act of discrimination, and governments should penalize those who disseminate this information with criminal and civil penalties.[233] Various federal statutes empower the government to seek modest penalties against persons who intimidate voters.[234] Advocates realized the weakness of

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233. Jordan T. Stringer, Comment, *Criminalizing Voter Suppression: The Necessity of Restoring Legitimacy in Federal Elections and Reversing Disillusionment in Minority Communities*, 57 EMORY L.J. 1011, 1042, 1047-48 (2008) (offering the following suggestions to deter voter suppression: 1) "the use of phone harassment legislation should continue as an innovative prosecutorial" technique, 2) "prosecutors should extend" the technique to "robo-calls," 3) "Congress should amend mailfraud legislation" to include mailings that "defrauds someone of his or her right to vote," 4) "Congress should [pass] the legislation [proposed by] Senators Schumer and Obama," and 5) Congress "should resolve the conflicting perspectives of voter access and voter security in the name of electoral integrity and constitutional fidelity."); *see also* Pardo, *supra* note 78, at 329-30 (discussing election fraud and arguing for use of the Travel Act, 18 U.S.C. § 1952 (2006), which is used to prosecute offenders whose conspiracies require interstate travel, and the Mail Fraud Statute, 18 U.S.C. § 1341 (2006), which is used when mail fraud is involved in election fraud or intimidation schemes); Rothschild & Wolinsky, *supra* note 101.

234. *See, e.g.*, 42 U.S.C. § 1971(c) (2006) (empowering the Attorney General to bring a civil action to prevent or enjoin the activity and noting that "the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order"); *supra* Part I.A.2. 42 U.S.C. § 1973j(a) allows the Attorney General to bring a civil action and seek up to $5,000 and impose five-year prison sentence.

Id. § 1973j(d) provides,

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 1973, 1973a, 1973b, 1973c, 1973e, 1973h, 1973i, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order . . . .

Id.

18 U.S.C. § 594 (2006) imposes a fine or one year of prison upon persons who intimidate, threaten or coerce persons from exercising the right to vote. Section 594 provides:

> Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . . shall be fined under this title or imprisoned not more than one year, or both.

See Rothschild & Wolinsky, *supra* note 101, at 393-427 (providing an exhaustive list of applicable civil, criminal and administrative laws that the federal government has available to combat voter

Section 11(b) and argued for strengthening the VRA, and specifically suggested that Congress strengthen its voter intimidation laws.[235] They expressly suggested that persons who engaged in harassment or intimidation of minority voters should face criminal sanctions and that Congress should provide a private right of action for individuals who have suffered from this illegal intimidation. They also suggested that the injured individuals should be eligible to receive injunctive relief, statutory damages, and attorneys' fees.[236] After reauthorization of the VRA in 2007, Congress did not address this issue.[237] Conversely, the NVRA includes a private right of action, but most litigation pertaining to this statute has included other voter access-related issues, such as the state's unwillingness or inability to comply with its voter registration requirements.[238] None of the litigation involved voter intimidation or voter deception.

The Obama/Schumer bill would have increased monetary penalties from $5,000 to $100,000 and would have increased possible prison time from one year to five years.[239] These types of increases would make the statute meaningful and would hopefully exhibit the seriousness associated with the actions.

Additionally, if the government seeks to criminalize deception, it should also strengthen civil penalties. The existing penalties could serve as a deterrent for individuals. When groups engage in deceptive practices, e.g., the Republican Party in the Jesse Helms example,[240] statutes must impose stricter penalties. If prosecutors can link deceptive actions to a political campaign, such as the 2006 example of Prince George's County, Maryland,[241] it should consider escalating penalties, especially if it can demonstrate that the candidate or members of the political party knew that the information contained intentionally false information.

CONCLUSION

The establishment of the democratic form of government and the framers' view of the importance of having the people voice their content or discontent through the ballot have sustained much debate and controversy. Deceptive practices undermine a citizen's right to participate freely in the democratic

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intimidation and other election law violations).

235. *See* VERNON FRANCIS ET AL., LAWYER'S COMM. FOR CIVIL RIGHTS UNDER LAW, PRESERVING A FUNDAMENTAL RIGHT: REAUTHORIZATION OF THE VOTING RIGHTS ACT (2003), http://faculty.washington.edu/mbarreto/courses/Voting_Rights.pdf.

236. *Id.* at 14.

237. *See* 42 U.S.C. § 1973 (2006).

238. *See* Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1412-13 (9th Cir. 1995) (action trying to enjoin California from failing to comply with NVRA); Ass'n of Cmty. Org. for Reform Now v. Edgar, 880 F. Supp. 1215 (N.D. Ill. 1995) (private action brought against Illinois for failure to comply with provisions of NVRA).

239. Deceptive Practices and Voter Intimidation Act, S. 453, 110th Cong. § 3 (2007).

240. *See supra* notes 123-24.

241. *See supra* Part I.A.

process. When the right to vote is stolen via fraudulent, intimidating, or deceptive acts, not only are the particular voter or group of citizens disenfranchised, but their confidence in the democratic process is also undermined. The pervasive inability or disinterest in prosecuting these acts leads the perpetrators to believe that their actions can continue without penalty and regard for their injury to democracy.

This right to participate embodies the essence of the democratic voting process. When this access is thwarted by connivery, deception, intimidation, or fraud, the fabric of the nation begins to unravel. Securing the threads of our democratic fabric, through enforcement of constitutional rights and statutory protections, tightens the bonds of freedom and protects the confidence and access that citizens need and require to participate free from deceptive practices. Governmental entities should wrap themselves in the protections afforded under various constitutional provisions, including the Equal Protection Clause, to protect its citizens from these acts. Where Congress lacks the willingness to pursue such acts, the affected citizenry should have the opportunity to pursue a private right of action in an effort to preserve the legitimacy of the democratic process.

THE FOREIGN CORRUPT PRACTICES ACT IN THE ULTIMATE YEAR OF ITS DECADE OF RESURGENCE

MIKE KOEHLER*

INTRODUCTION

The Foreign Corrupt Practices Act (FCPA) was enacted in 1977, yet FCPA enforcement was largely non-existent for most its history.[1] But during the past decade, enforcement agencies resurrected the FCPA from near legal extinction. FCPA enforcement activity in 2009, the ultimate year in the decade of the FCPA's resurgence, suggests that FCPA enforcement will remain a prominent feature on the legal landscape throughout this decade. After providing a brief overview of the FCPA and FCPA enforcement, this Article highlights FCPA issues and trends from the 2009 enforcement year and provides a glimpse of the road ahead as the FCPA enters a new decade.

I. THE FOREIGN CORRUPT PRACTICES ACT SUMMARIZED

The FCPA is part of the Securities Exchange Act of 1934,[2] and it has two main provisions: the antibribery provisions[3] and the books and records and internal control provisions.[4] To better understand the FCPA issues and trends from the 2009 enforcement year, these provisions, as well as FCPA enforcement, are described next.

A. Antibribery Provisions

The antibribery provisions generally prohibit U.S. companies (whether public or private) and their personnel; U.S. citizens; foreign companies with shares listed on a U.S. stock exchange or otherwise required to file reports with the SEC; or any person while in U.S. territory from: (i) corruptly paying, offering to pay,

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1. *See* Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, at A1, *available at* http://online.wsj.com/article/SB124329477230952689.html (noting that FCPA enforcement was "largely dormant for decades"). *See, e.g.*, SHEARMAN & STERLING LLP, FCPA DIGEST, CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, *available at* http://www.shearman.com/files/upload/fcpa_digest.pdf (listing FCPA enforcement actions chronologically); *see also* Foreign Corrupt Practices Act (FCPA), http://www.justice.gov/criminal/fraud/docs/statute.html (last visited Mar. 8, 2010).

2. *See* 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2, 78dd-3, 78ff (2006).

3. *See infra* Part I.A.

4. *See infra* Part I.B.

promising to pay, or authorizing the payment of money, a gift, or anything of value; (ii) to a foreign official; (iii) in order to obtain or retain business.[5]

Although routinely described as a law applicable only to U.S. companies and citizens,[6] the FCPA, as written and as enforced, can also apply to foreign companies and foreign citizens.[7] In fact, the largest ever FCPA enforcement action (in terms of fines and penalties) is against Siemens Aktiengesellschaft (also known as "Siemens AG"), a German corporation with shares traded on a U.S. exchange since 2001.[8]

The FCPA's antibribery provisions have three core elements: "anything of value"[9] to a "foreign official"[10] for the purposes of "obtaining or retaining business."[11] This Part briefly explores these core elements.

1. "Anything of Value."—The FCPA does not define the term "anything of value," nor is the statute's legislative history illuminating.[12] FCPA enforcement actions demonstrate that there is no de minimis value associated with this element[13] and 2009 FCPA enforcement actions allege facts concerning "things of value" across a wide spectrum. For instance, in the enforcement action against Kellogg Brown & Root LLC and various other Halliburton Company affiliates, "things of value" provided to Nigerian "foreign officials" included cash-stuffed briefcases or cash-stuffed vehicles left in hotel parking lots.[14] On the other end of the spectrum, the enforcement action against UTStarcom Inc. involved "things of value" provided to Chinese "foreign officials" including "executive training programs at U.S. universities" paid for by the company even though the programs

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5. *See* 15 U.S. §§ 78dd-1, 78dd-2, 78dd-3 (2006).

6. *See, e.g.*, Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 157 (2009) ("The U.S. Foreign Corrupt Practices Act (FCPA) criminally prohibits U.S. corporations from bribing officials of foreign governments in order to obtain business has been in effect for thirty years.").

7. *See* 15 U.S.C. §§ 78dd-1, 78dd-3.

8. *See, e.g.*, Press Release, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* http://www.foley.com/files/SiemensSECPressRelease.pdf; Press Release, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* http://www.fcpaenforcement.com/FILES/tbl_s31Publications/FileUpload137/5527/SiemensDOJPressRelease.pdf.

9. 15 U.S.C. § 78dd-1(a).

10. *Id.* § 78dd-1(a)(1).

11. *Id.* § 78dd-1(a)(1)(B).

12. S. REP. NO. 95-114, at 17 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4115; H.R. CONF. REP. NO. 95-831, at 12 (1977), *reprinted in* U.S.C.C.A.N. 4121, 4124.

13. *See, e.g.*, *In re* The Dow Chem. Co., Exchange Act Release No. 55281, 2007 SEC LEXIS 286, at *7 (Feb. 13, 2007) (nothing that although certain improper payments "were in small amounts—well under $100 per payment—the payments were numerous and frequent").

14. *See* Criminal Information ¶¶ 17-20, United States v. Kellogg Brown & Root LLC, No. H-09-071 (S.D. Tex. Feb. 6, 2009), *available at* http://fcpaenforcement.com/FILES/tbl_s31Publications/FileUpload137/5714/KBRCriminalInformation.pdf.

"were not specifically related to [the company's] products or business."[15]

2. "Foreign Official."—The FCPA defines "foreign official" as:

> any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.[16]

There is no dispute that elected foreign government officials, other foreign heads of state, and employees of foreign government agencies such as foreign equivalents of the U.S. Treasury Department, U.S. State Department, etc., are "foreign officials" under the FCPA. Improper payments to such "foreign officials" to "obtain or retain business" are what Congress intended to prohibit by passing the FCPA in 1977.[17]

But the majority of 2009 FCPA enforcement actions (as well as others in recent years) have absolutely nothing to do with such government officials. Rather, the alleged "foreign officials" are often employees of alleged foreign state-owned or state-controlled enterprises (SOEs).[18] The enforcement agencies deem such individuals (regardless of rank or title[19] and regardless of how such

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15. Complaint ¶ 16, SEC v. UTStarcom, Inc., Case No. CV 09-6094 (N.D. Cal., Dec. 31, 2009), *available at* http://www.sec.gov/litigation/complaints/2009/comp21357.pdf.

16. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2006).

17. *See* S. REP. NO. 95-114, at 1-3 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf (noting in connection with the history of the bill—"[d]uring the 94th Congress, the Committee on Banking, Housing, and Urban Affairs held extensive hearings on the matter of improper payments to foreign *government* officials by American corporations; noting in connection with a summary of the bill—"[the bill] makes it a crime for U.S. companies to bribe a foreign *government* official for the specified corrupt purposes" and "[t]aken together, the accounting requirements and criminal prohibitions of Title I should effectively deter corporate bribery of foreign *government* officials." (emphasis added); *see also* H. REP. NO. 94-831, at 5 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/corruptrpt-94-831.pdf (consolidating similar, but not identical, House and Senate bills and noting that "[b]y incorporating provisions from both bills, the conferees clarified the scope of the prohibition by requiring that the purpose of the payment must be to influence any act or decision of a foreign official (including a decision not to act) or to induce such official to use his influence to affect a *government* act or decision") (emphasis added); H. REP. NO. 95-640, at 1 (1977), *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf (noting in connection with the need for the legislation "[m]ore than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of $300 million in corporate funds to foreign *government* officials, politicians, and political parties.") (emphasis added).

18. *See infra* notes 120-28 and accompanying text.

19. Lay-Person's Guide to FCPA, *available at* http://www.justice.gov/criminal/fraud/docs/dojdocb.html ("The FCPA applies to payments to *any* public official, regardless of rank or position.").

individuals may be classified under local foreign law[20]) as "foreign officials" under the theory that their employers (often times a company with publicly traded stock and other attributes of private business) are an "instrumentality" of a foreign government.[21] The enforcement agencies' interpretation of the key "foreign official" element of an FCPA antibribery violation is far from an academic issue-spotting exercise. Rather, it is at the core of a significant number of 2009 FCPA enforcement actions as demonstrated in Part II.

3. "Obtain or Retain Business."—The third general element of an FCPA antibribery violation is "obtain or retain business."[22] In other words, the "thing of value"[23] corruptly offered or paid to the "foreign official" must be for the purposes of

> (i) influencing any act or decision of such foreign official . . . (ii) inducing such foreign official . . . to do or omit to do any act in violation of the lawful duty of such foreign official . . . or (iii) securing any improper advantage; or inducing such foreign official . . . to use his . . . influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.[24]

In contrast to the "foreign official" element and many other FCPA elements and issues, this substantive element has been subject to judicial scrutiny. In *United States v. Kay*, a case of first impression, the issue concerned whether payments to Haitian "foreign officials" for reducing customs and sales taxes owed to the Haitian government could fall within the FCPA's scope.[25] The issue presented was in contrast to a typical FCPA scenario in which a company allegedly makes improper payments to a "foreign official" to secure a foreign government

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20. *See* Opinion Procedure Release, Dep't of Justice, No. 94-01 (May 13, 1994), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/1994/9401.html (opining that a general director of a state-owned enterprise being transformed into a joint stock company is a "foreign official" under the FCPA despite a foreign law opinion that the individual would not be regarded as either a government employee or a public official in the foreign country). Pursuant to 15 U.S.C. § 78dd-1(e) (2006), parties may submit contemplated actions or business activity to the DOJ and obtain a DOJ opinion whether the contemplated action or business activity violates the FCPA. However, the DOJ's opinion has no precedential value, and its opinion that the contemplated conduct is in conformance with the FCPA is entitled only to a rebuttable presumption should an FCPA enforcement action be brought because of the conduct. *See* Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. §§ 80.1-80.16 (2009), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/frgncrpt.html.

21. *See* Procedure Release, *supra* note 20.

22. 15 U.S.C. §§78dd-1(a)(9)(B), 78dd-2(a)(1)(B), 78dd-3(a)(1)(B) (2006).

23. *Id.* § 78dd-1(a)(3).

24. *Id.*

25. *See* United States v. Kay, 359 F.3d 738 (5th Cir. 2004).

contract.[26]

In *Kay*, the Fifth Circuit Court of Appeals concluded, like the lower court, that the "obtain or retain business" element was ambiguous, and it thus analyzed the FCPA's legislative history.[27] In reviewing the legislative history, the court was convinced that Congress intended to prohibit a range of payments wider than payments that directly influence the acquisition or retention of government contracts.[28] The court thus held that making payments to a "foreign official" to lower taxes and custom duties in a foreign country *can* provide an unfair advantage to the payer over competitors and thereby assist the payer in "obtaining and retaining business."[29]

But the *Kay* court empathically stated that not *all* such payments to a "foreign official" outside the context of directly securing a foreign government contract violate the FCPA; it merely held that such payments *could* violate the FCPA.[30] According to the court, the key question of whether such payments constitute an FCPA violation depend on whether the payments were intended to lower the company's costs of doing business in Haiti enough to assist the company in obtaining or retaining business in Haiti.[31] The court then listed several hypothetical examples of how a reduction in customs and tax liabilities could assist a company in obtaining or retaining business in a foreign country.[32] On the other hand, the court also recognized that "[t]here are bound to be circumstances" in which a customs or tax reduction merely increases the profitability of an existing profitable company and presumably does not assist the payer in obtaining or retaining business.[33]

Thus, contrary to popular misperception,[34] *Kay* does *not* hold that *all* payments to a "foreign official" for avoiding customs duties or sales taxes in a foreign country fall within the FCPA's scope. Rather, the decision merely holds that Congress intended for the FCPA to apply broadly to payments intended to assist the payer, directly or indirectly, in obtaining or retaining business and that payments to a "foreign official" to reduce customs and tax liabilities can, under appropriate circumstances, fall within the statute.

Despite the equivocal nature of the *Kay* holding, the decision clearly

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26. *See, e.g.*, *In re* United Indus. Corp., Exchange Act Release No. 60005 (May 29, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf (instituting FCPA enforcement action concerning payments to Egyptian Air Force officials to build a military aircraft depot for Egypt's Air Force).

27. *See Kay*, 359 F.3d at 743-44.

28. *See id.* at 749-50.

29. *See id.* at 755-56.

30. *Id.*

31. *Id.*

32. *See id.* at 759-60.

33. *Id.* at 760.

34. *See* Chadbourne & Park LLP, United States Supreme Court Denies Certiorari in Controversial Foreign Corrupt Practices Act Case: Expansive Enforcement of the FCPA Likely to Continue, http://www.chadbourne.com/clientalerts/2008/fcpa/ (last visited Mar. 26, 2010).

energized the enforcement agencies. Post-*Kay* there has been an explosion in FCPA enforcement actions, including actions in 2009, where the alleged improper payments involve customs duties and tax payments or are otherwise alleged to have assisted the payer in securing foreign government licenses, permits, and certifications which assisted the payer in generally doing business in a foreign country.[35]

In short, the FCPA's antibribery provisions generally prohibit those subject to the statute from corruptly paying or offering "anything of value" to a "foreign official" in order to "obtain or retain business." Because of the FCPA's third-party payment provisions, described below, this prohibition is both direct and indirect.

4. Third-Party Payment Provisions.—The FCPA's broad third-party payment provisions prohibit those subject to its provisions from directly making payments meeting the above elements, as well as providing anything of value to "any person, while knowing" that all or a portion of the thing of value will be given, directly or indirectly, to a "foreign official" to "obtain or retain business."[36] Like other FCPA elements, the enforcement agencies broadly interpret this knowledge requirement. The knowledge element may be satisfied when one has actual knowledge that a third party is providing "anything of value" to a "foreign official" to "obtain or retain business" and also when one"has a firm belief that such circumstance exists or that such result is substantially certain to occur" or "is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."[37]

B. Books and Records and Internal Control Provisions

The FCPA, as originally enacted in 1977 and at present, also contains books and records and internal control provisions.[38] In contrast to the antibribery provisions, the books and records and internal control provisions only apply to

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35. *See, e.g.*, Complaint ¶¶ 1, 51, SEC v. Nature's Sunshine Prods. et al., No. 2:09CV0672 (C.D. Utah July 31, 2209), *available at* http://www.sec.gov/litigation/complaints/2009/comp21162.pdf (charging FCPA violations involving payments to Brazilian customs agents to import certain unregistered products into Brazil); Helmerich & Payne, Inc., Non-Prosecution Agreement, Statement of Facts ¶4 (July 9, 2009), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/helmerich.pdf [hereinafter Helmerich & Payne, Inc.]; *In re* Helmerich & Payne, Inc. Cease and Desist Order ¶¶ 5-8, Release No. 60400 (S.E.C. July 30, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60400.pdf [hereinafter *In re* Helmerich & Payne] (charging FCPA violations involving payments to various officials and representatives of the Argentine and Venezuelan customs services in connection with the importation and exportation of goods and equipment related to the company's business operations in those countries).

36. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3) (2006).

37. *See id.* § 78dd-1(f)(2)(A)-(B); *see also* Kenneth Winer & Gregory Husisian, *The 'Knowledge' Requirement of the FCPA Anti-Bribery Provisions: Effectuating or Frustrating Congressional Intent?* WHITE-COLLAR CRIME, Oct. 2009, at 10, *available at* http://www.foley.com/files/tbl_s31Publications/FileUpload137/6535/FCPAWinerHusisian2009.pdf.

38. 15 U.S.C. § 78m(b)(2)(A)-(B) (2006).

entities with "a class of securities" registered pursuant to the securities laws or entities otherwise "required to file reports" pursuant to the securities laws (collectively "Issuers").[39] As a practical matter,[40] the books and records and internal control provisions apply only to publicly-held companies with shares traded on a U.S. exchange—a category which can include numerous foreign companies with shares traded on a U.S. exchange.[41]

The books and records provisions require Issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the [I]ssuer."[42] The companion internal control provisions require Issuers to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that"—among other things:

> (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements . . . (II) to maintain accountability for assets; [and] (iii) access to assets is permitted only in accordance with management's general or specific authorization . . . .[43]

C. Enforcement of the Foreign Corrupt Practices Act

The FCPA is both a civil statute and a criminal statute, and because it is part of the securities law, both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have enforcement authority. Like other securities law violations (such as insider trading), the issue of intent and a prosecutor's ability to satisfy the higher burden of proof required for a criminal conviction (beyond a reasonable doubt) may determine whether an FCPA violation is pursued with criminal charges or merely civil charges. In terms of which enforcement agency (DOJ or SEC) will prosecute the charges, the SEC has civil enforcement authority only, and, even more constrained, it only regulates Issuers. The end result is that the DOJ "is responsible for all criminal enforcement" of the statute (both the antibribery and books and records and internal control

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39. *Id.*

40. In rare instances, a company may still be "required to file periodic reports" pursuant to the securities laws, yet not have publicly traded shares. *See* The FCPA Blog, http://www.fcpablog.com/blog/2010/1/10/non-public-issuer-discloses-investigation.html (Jan. 10, 2010, 10:08) (noting that PBSJ Corporation, while not having any publicly traded securities, is nevertheless required to file periodic reports with the SEC given the extent of its shareholders (mostly current and former employees).

41. *See, e.g.*, Press Release, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006), *available at* http://www.justice.gov/opa/pr/2006/October/06_crm_700.html ("Although Statoil is a foreign issuer, the Foreign Corrupt Practices Act applies to foreign and domestic public companies alike, where the company's stock trades on American exchanges . . . .").

42. 15 U.S.C. § 78m(b)(2)(A) (2006).

43. *Id.* § 78m(b)(2)(B).

provisions) and civil enforcement of the antibribery provisions against non-Issuers subject to the FCPA jurisdiction.[44] The SEC is responsible "for civil enforcement of the antibribery provisions with respect to [I]ssuers" as well as civil enforcement of the books and records and internal control provisions.[45]

Because improper payments that violate the FCPA's antibribery provisions are also often disguised or inaccurately recorded on the company's books and records, many FCPA enforcement actions against Issuers include parallel DOJ and SEC enforcement actions for both antibribery violations and books and records violations.[46] Further, internal control violations are often also pursued in connection with antibribery and books and records violations on the theory that effective internal controls would have prevented the improper payments and improper recording of the payments.[47] Thus, as to Issuers, the FCPA is often a three-headed monster when improper payments are made.

II. FCPA TRENDS AND ISSUES FROM THE 2009 ENFORCEMENT YEAR

The 2009 FCPA enforcement year saw the emergence of new trends and issues as well as the continuation of certain aggressive enforcement theories. Notable trends and issues from the 2009 FCPA enforcement year include the undeniable fact that FCPA risk is omnipresent, the clear FCPA risks posed by foreign agents, the emerging trend of individual (as opposed to just corporate) FCPA prosecutions, and the troubling continuation of certain aggressive FCPA theories of liability. These trends and issues are described below in more detail.

A. FCPA Risk Is Omnipresent

For much of the FCPA's history, the business community largely viewed the FCPA as applying only to large companies, often resource extraction companies, doing business in emerging markets. But with the increase in globalization, and with domestic market saturation, particularly in a recession economy, it is no longer just large resource extraction companies doing business in overseas markets that need to be concerned with the FCPA. Although a company like Exxon Mobil or Raytheon (given its large foreign government customer base) may indeed have a higher FCPA risk profile, the FCPA equally applies to small and medium sized companies, including those in Indiana, doing business or seeking business in countries such as China and India. If the increase in FCPA enforcement over the last decade has taught anything, it is that all companies, in all industries, doing business in all countries face FCPA risk and exposure. This

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44. *See* Lay-Person's Guide to FCPA, *supra* note 19.

45. *Id.*

46. *See* Press Release, UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China (Dec. 31, 2009), *available at* http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html; SEC v. UTStarcom, Inc., Litigation Release No. 21357 (Dec. 31, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21357.htm [hereinafter UTStarcom, Inc. Litigation Release].

47. *See* UTStarcom, Inc. Litigation Release, *supra* note 46.

salient fact is demonstrated by the below chart which lists the 2009 corporate FCPA enforcement actions and provides details as to the industry and foreign jurisdiction(s) involved.

Corporate FCPA Enforcement Actions (2009)—Industries and Jurisdictions[48]

Company	Industry	Jurisdiction(s)
Avery Dennison Corp.[49]	Consumer products, adhesives, and materials	China, Indonesia, and Pakistan
Control Components Inc.[50]	Valve manufacturer serving the power, oil and gas, and pulp and paper industries	China, South Korea, Malaysia, and United Arab Emirates
Helmerich & Payne Inc.[51]	Energy exploration and production	Argentina and Venezuela
ITT Corp.[52]	Engineering and manufacturing company serving the water and fluids management and defense and security industries	China

48. Excluded from the chart are two Iraqi Oil-For Food enforcement actions involving AGCO Corporation and Novo Nordisk A/S. *See, e.g.*, Press Release, AGCO Corp. to Pay $1.6 Million in Connection with Payments to the Former Iraqi Government Under the U.N. Oil-For-Food Program (Sept. 30, 2009), *available at* http://www.foley.com/files/DOJagcopenalty.pdf; Press Release, Novo Nordisk Agrees to Pay $9 Million Fine in Connection with Payment of $1.4 Million in Kickbacks Through the United Nations Oil-For-Food Program (May 11, 2009), *available at* http://www.foley.com/files/NovoDOJRelease.pdf. These actions involved kickback payments to the Iraqi government—not to any particular "foreign official," and thus, the conduct was not actionable under the FCPA's antibribery provisions. *See id.* Even so, the payments and recording of the payments still resulted in an FCPA enforcement action for books and records and internal control violations. *See id.* This Article will refer to the enforcement actions represented in this chart (minus these two exclusions) as the "2009 Corporate FCPA Enforcement Actions."

49. Complaint, SEC v. Avery Dennison Corp., No. CV09-5493DSF (C.D. Cal. July 28, 2009), *available at* http://www.sec.gov/litigation/complaints/2009/comp21156.pdf.

50. Criminal Information, United States v. Control Components Inc., No. SACR09-00162 (C.D. Cal. July 28, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty-information.pdf.

51. Helmerich & Payne, Inc., *supra* note 35; *In re* Helmerich & Payne, *supra* note 35.

52. Complaint, SEC v. ITT Corp., No. 1:09-cv-00272 (D.D.C. Feb. 11, 2009), *available at* http://www.sec.gov/litigation/complaints/2009/comp20896.pdf.

KBR/Halliburton Co.[53]	Engineering, procurement, and construction company serving the oil and gas industry	Nigeria
Latin Node, Inc.[54]	Telecommunications	Honduras and Yemen
Nature's Sunshine Products, Inc.[55]	Nutritional supplements and personal care products	Brazil
United Industrial Corp.[56]	Defense	Egypt
UTStarcom Inc.[57]	Telecommunications	China, Thailand, and Mongolia

As highlighted by the above chart, the FCPA does not discriminate against any one industry doing business in any particular country. The 2009 enforcement year also demonstrates that it is just not Asian, African, or Middle Eastern markets that present FCPA risks as several of the above enforcement actions concerned conduct "closer to home" in the Western Hemisphere—a region that is often overlooked in terms of FCPA compliance. The breadth of 2009 enforcement actions, both in terms of the companies involved and the countries where the alleged conduct took place, show that FCPA risk is present in all industries operating in all countries.

B. Third Party Agents Pose a Risk

The primary means of doing business or expanding business in a foreign market is often to engage a foreign agent.[58] A foreign agent brings to the table what a non-resident company lacks—an understanding and appreciation for the local business environment and solid relationships with key business actors—both key ingredients to a non-resident company's success in a foreign

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53. Complaint, SEC v. Halliburton Co., No. 4:09-399 (S.D. Tex. Feb. 11, 2009), *available at* http://www.sec.gov/litigation/complaints/2009/comp20897.pdf; Criminal Information, *supra* note 14.

54. Criminal Information, United States v. Latin Node, Inc., No. 09-20239-CR-HUCK/O'Sullivan (Mar. 23, 2009 S.D. Fla.), *available at* http://fcpaenforcement.com/FILES/tbl_s31Publications/FileUpload137/5945/Item1LatinNode.pdf.

55. Complaint, *supra* note 35.

56. *In re* United Indus. Corp., Exchange Release No. 6005 (May 29, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf.

57. UTStarcom, Inc. Non-Prosecution Agreement (Dec. 31, 2009), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/utstarcom.pdf; Complaint, SEC v. UTStarcom, Inc., *supra* note 15.

58. This section uses the generic term "foreign agent" to refer to a wide range of foreign third-party business partners such as foreign representatives, foreign distributors, foreign consultants, foreign customs brokers, and foreign joint venture partners.

market.[59]

Use of foreign agents is particularly high in growth markets such as China and India where understanding and navigating through complex bureaucracies is often a key ingredient to business success.[60] Further, in many foreign countries, including most notably those in the Middle East, engaging a local agent or having a local sponsor is a *requirement* before a non-resident company can do business in the country.[61]

But these attractive features of a foreign agent (i.e., knowledge of the local business environment and relationships with key business actors) also present the most troublesome risks for a company obligated to comply with the FCPA in doing business in overseas markets. The FCPA risks posed by foreign agents is demonstrated by the below chart which lists the 2009 corporate FCPA enforcement actions involving, in whole or in part, foreign agent conduct.

Corporate FCPA Enforcement Actions (2009)—Foreign Agents

Company	**Conduct**
Avery Dennison Corp.[62]	According to the SEC Complaint and Cease and Desist Order, Avery Dennison Corporation's indirect subsidiary Avery (China) Co. Ltd. paid, either directly or *indirectly through others including distributors*, several kickbacks, sightseeing trips, and gifts to Chinese foreign officials with the purpose and effect of improperly influencing decisions by the foreign officials to assist Avery China to obtain or retain business.

59. Jamie Anderson et al., *Global Business—Lessons From the Developing World*, WALL ST. J., at R6, Aug. 17, 2009. This article profiles two companies that have penetrated markets in the developing world through engagement of local partners. *Id.* One company was able to succeed in rural Nigeria by working with local people who understood "local dynamics" and a "deep understanding of how to manage the local environment." *Id.* Another company flourished in India by "benefit[ing] from [the] wisdom" of local businesspeople already running business in the market. *Id.*

60. *See, e.g.*, *Danone Pulls Out of Disputed China Venture*, WALL ST. J., Oct. 1, 2009, at B1 (noting that "[f]oreign firms have reported billions in sales through Chinese partnerships. International giants such as Procter & Gamble, Starbucks and General Motors have operated wholly or in part through joint ventures in China").

61. *See, e.g.*, Lisa Middlekauff, *To Capitalize on a Burgeoning Market? Issues to Consider Before Doing Business in the Middle East*, 7 RICH. J. GLOBAL L. & BUS. 159, 170 (2008).

62. SEC v. Avery Dennis Corp., Litigation Release No. 21156 (July 28, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21156.htm; Complaint, *supra* note 49.

Control Components Inc.[63]	According to the DOJ Criminal Information, Control Components Inc. made improper payments through its employees, *agents, and consultants* to (among others) officers of Chinese and Korean state-owned or state-controlled entities in order to obtain or retain business. Often times, the agents and consultants were used as "pass-through" entities to facilitate the improper payments.
Helmerich & Payne, Inc.[64]	According to the DOJ Non-Prosecution Agreement and the SEC's Cease and Desist Order, Helmerich & Payne Inc. acknowledged responsibility for the conduct of two wholly-owned second tier subsidiaries, Helmerich & Payne (Argentina) Drilling Company and Helmerich & Payne de Venezuela C.A. for payments made by subsidiary employees and *agents* to customs officials in Brazil and Argentina to induce the officials to allow import and export of goods that were not within applicable regulations thereby evading higher duties and taxes on the goods.
ITT Corp.[65]	According to the SEC's Complaint, ITT's wholly-owned Chinese subsidiary, Nanjing Goulds Pumps Ltd. (NGP), made, either directly or *indirectly through third-party agents* payments to employees of Chinese Design Institutes (DIs) (some of which were Chinese state-owned entities that assisted in the design of large infrastructure projects in China). The SEC alleged that NGP employees made certain of the payments through agents using inflated commissions to the agents with the understanding that the agents would then make payment to the DI employees who specified and recommended NGP products.
Kellogg Brown & Root LLC/KBR, Inc./Halliburton Co.[66]	According to the DOJ Criminal Information, Kellogg Brown & Root LLC participated in a joint venture that made millions of dollars in *"consulting fee" payments to a United Kingdom and Japanese agent* for use in bribing Nigerian "foreign officials." Similarly, the SEC complaint alleges that KBR Inc. and Halliburton Co. participated and/or controlled and supervised entities that participated in the joint venture that entered into the sham contracts with the two agents to help facilitate the bribe payments.

63. *See* Criminal Information, *supra* note 50; Press Release, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Criminal Fine (July 31, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty.pdf.

64. *See* Helmerich & Payne, *supra* note 35; Press Release, Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America (July 30, 2009), *available at* http://www.justice.gov/opa/pr/2009/July/09-crm-741.html.

65. Complaint, *supra* note 52; SEC v. ITT Corp. Litigation Release No. 20896 (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20896.htm.

66. *See* Complaint, *supra* note 53; Criminal Information, *supra* note 14.

Latin Node, Inc.[67]	According to the DOJ Criminal Information, Latin Node, Inc. made improper payments to officials of Hondutel (the Honduran government-owned telecommunications company) and TeleYemen (the Yemeni government-owned telecommunications company). In Honduras, the DOJ alleged that Latin Node caused LN Comunicaciones (a wholly-owned Guatemalan subsidiary) and Servicios IP, S.A. (a Guatemalan company nominally owned by two LN Comunicaciones employees) to sign a purported *consulting agreement with a company* believed to be controlled by a foreign officials' brother. The DOJ alleged that LN Comunicaciones' employees signed checks to Servicios IP knowing and intending that some or all of the money would be passed along to Hondutel officials. In Yemen, the DOJ alleged that Latin Node, while seeking to enter the Yemeni market, learned that *Yemen Partner A* had obtained an agreement with TeleYemen at a favorable rate through his privately owned company. Latin Node sought to partner with Yemen Partner A to gain entry into the Yemeni market even though Latin Node understood that Yemen Partner A had received the favorable rate by making corrupt payments to certain Yemeni officials.
Nature's Sunshine Products, Inc.[68]	According to the SEC's Complaint, Nature's Sunshine Products, Inc. (NSP), through the conduct of its wholly-owned subsidiary in Brazil, made cash payments to *customs broker agents*, some of which was later used to pay Brazilian customs officials so that the officials would allow NSP Brazil to import unregistered product into Brazil.
United Industrial Corp.[69]	According to the SEC Cease and Desist Order, United Industrial Corporation's (UIC), indirect wholly owned subsidiary, ACL Technologies Inc. (ACL) made payments to a *foreign agent* to obtain or retain business with the Egyptian Air Force. As described in the Order, ACL's former President authorized payments to the agent while knowing or consciously disregarding the high probability that the agent would offer, provide or promise at least a portion of the payments to Egyptian Air Force officials for the purpose of influencing the officials to direct business to UIC through ACL.

67. *See* Criminal Information, *supra* note 43; Press Release, Latin Node Inc. Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (Apr. 7, 2009), *available at* www.justice.gov/criminal/pr/press_releases/2009/04/04-07-09LatinNode-Plead.pdf.

68. *See* Complaint, *supra* note 54; SEC v. Nature's Sunshine Prods., Inc., Litigation Release No. 21162 (July 31, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21162.htm.

69. *See In re* United Indus. Corp., Exchange Release No. 60005 (May 29, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf.

UTStarcom Inc.[70]	According to the SEC's Complaint, the company "made payments to *purported consultants* in China and Mongolia who provided no documented services, under circumstances that showed a high probability that the payments would be used to bribe" foreign officials.

The FCPA risks in utilizing a foreign agent as demonstrated by the above enforcement actions is most striking given that there were a total of nine corporate FCPA enforcement actions in 2009.[71] Thus, all of the 2009 enforcement actions against companies involved (in whole or in part) foreign agent conduct.

Engaging a foreign agent and maintaining a relationship with that agent can expose a company to FCPA liability under both the FCPA's antibribery and books and records and internal control provisions. When a foreign agent is used to make or facilitate an improper payment to a "foreign official" to "obtain or retain business," sham consulting contracts and/or inflated commission payments are often utilized thus leading to improper recordings in the company's books and records. Even if the foreign agent is engaged by a distant subsidiary or affiliate, and even if the improper recording is made in that subsidiary's or affiliate's books and records, a parent company will still likely face books and records exposure. The enforcement theory is that the subsidiary's or affiliate's books and records are consolidated with the parent's books and records for financial reporting purposes. A parent company will also face internal controls exposure on the theory that had the parent implemented sufficient internal controls throughout its organization, the improper payment would never had occurred. This controversial enforcement theory resembles strict liability and is best demonstrated by the 2009 FCPA enforcement action against Halliburton Co.[72]

In the Halliburton enforcement action, the company was held liable under the FCPA's books and records and internal control provisions based on the conduct of agents utilized, not by Halliburton, but by a joint venture in which Halliburton participated indirectly through subsidiaries. Even though there was no allegation that Halliburton knew of the improper conduct by the two agents (a U.K. agent and a Japanese agent), Halliburton was nevertheless held liable based on the allegation that Halliburton exercised control and supervision over the subsidiaries (such as KBR) that participated in the joint venture.[73]

For instance, the SEC alleged that Halliburton exercised control and supervision over KBR and that during the relevant time period: (i) KBR's board of directors consisted solely of senior Halliburton officials; (ii) the senior

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70. Complaint, *supra* note 9; UTStar com., Inc. Litigation Release, *supra* note 46; Press Release, *supra* note 46.

71. *See* The FCPA Blog, http://www.fcpablog.com/blog/2009/12/31/2009-fcpa-enforcement-index.html (Dec. 31, 2009, 3:15).

72. *See supra* notes 53, 66 and accompanying text.

73. *See supra* notes 53, 66 and accompanying text.

Halliburton officials hired and replaced KBR's senior officials, determined salaries, and set performance goals; (iii) Halliburton consolidated KBR's financial statements into its own, and all of KBR's profits flowed directly to Halliburton and were reported to investors as Halliburton profits; and (iv) KBR's former CEO discussed the projects at issue with senior Halliburton officials, who were aware of the joint venture's use of the U.K. Agent, even though the SEC does not allege that this individual or anyone else at KBR told Halliburton officials that the U.K. Agent would use money obtained from the joint venture to bribe Nigerian officials.[74]

The SEC further alleged that while Halliburton's legal department conducted a due diligence investigation of the U.K. Agent, the due diligence was inadequate because Halliburton's policies did not require a specific description of the agent's duties and because the agent did not agree to any accounting or audit of fees received.[75] Further, the SEC alleged that Halliburton and KBR attorneys never learned the identity of the owners of the Gibraltar-based consulting company used by the U.K. Agent and did not check all of the agent's references, some of which turned out to be false.[76] As to the Japanese Agent, the SEC alleged that Halliburton conducted no due diligence and that Halliburton's policies and procedures were deficient because it failed to properly scrutinize the agreement with the agent.[77] The SEC further alleged that payments to the U.K. and Japanese Agents were falsely characterized as legitimate "consulting" or "services" fees in numerous Halliburton and KBR records (when, in fact, they were bribes) and thus charged Halliburton with not only FCPA internal control violations, but also books and records violations as well.[78]

The FCPA enforcement action against Halliburton and its affiliated entities sends a "proceed with caution" message to any company seeking to engage a foreign agent to assist in obtaining or retaining business. Parent companies should pay particular attention to the Halliburton action because FCPA exposure may arise not only from agents it engages, but also from agents engaged by all subsidiaries and affiliates over which the parent company exercises control and supervision.

C. The Year of the Individual

Although the 2009 FCPA enforcement year saw the Kellogg, Brown & Root/KBR, Inc./Halliburton Company enforcement action involving a massive bribery scheme in Nigeria (a record-setting enforcement action against a *U.S.* company given the $579 million in combined criminal and civil penalties[79]),

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74. *See* Complaint, *supra* note 53, ¶ 30.

75. *See id.* ¶ 31.

76. *See id.* ¶ 32.

77. *See id.* ¶ 36.

78. *See id.* ¶ 37.

79. Marcia Coyle, *Halliburton and KBR to Pay $579 Million in Penalties in Nigerian Bribe Case*, NAT'L L.J., Feb. 12, 2009, *available at* http://www.law.com/jsp/article.jsp?id=1202428219124.

corporate FCPA prosecutions largely slowed to a trickle in the second half of 2009. Whether the 100-plus cases widely reported to be in the "pipeline" are taking longer to resolve,[80] being resolved informally with no public disclosure, or about to burst onto the scene in 2010 remains an open question.

Nevertheless, the biggest FCPA issue from the 2009 enforcement year, and a clear emerging trend, is the focus on individual FCPA violators.[81] The DOJ's pursuit of individuals is no surprise as the deterrent effect of an individual losing his or her liberty is no doubt more powerful than a corporation paying a multi-million fine with corporate money via a non-prosecution or deferred prosecution agreement (NPA/DPA). Assistant Attorney General Lanny Breuer, in a speech before a FCPA audience in November 2009, underscored this point when he said that DOJ's pursuit of individuals was "no accident." He said that "prosecution of individuals is a cornerstone of [DOJ's] enforcement strategy," and that "the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations."[82]

1. Casting a Wider Net.—As indicated by Breuer's remarks, corporate employees are not the only subjects of FCPA scrutiny. A significant development from the 2009 enforcement year is also a focus on agents or consultants engaged by companies to help facilitate improper payments. For instance, in November 2009, Paul Novak (a former consultant of Willbros International Inc.) pleaded guilty to a substantive count of violating the FCPA and a conspiracy count for his role in facilitating payments to Nigerian foreign officials.[83] The Novak prosecution represents an FCPA triangle of sorts in that individual Willbros employees, as well as the corporation itself, previously settled FCPA enforcement actions based on the same core conduct.[84] In connection with the Novak plea, Breuer said that the "use of intermediaries to pay bribes will not escape prosecution under the FCPA" and that the DOJ "will continue to hold accountable all the players in an FCPA scheme—from the companies and their executives who hatch the scheme, to the consultant they retain to carry it out."[85]

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80. Roger Witten, *Foreign Corrupt Practices Act Compliance*, 2009 EMERGING ISSUES 472, Dec. 14, 2009 (citing Remarks of Mark Mendelsohn, Deputy Chief, Fraud Section of DOJ's Criminal Division, The 22nd National Forum on the Foreign Corrupt Practices Act, American Conference Institute (Nov. 17, 2009)).

81. See The FCPA Blog, *supra* note 71 (listing individuals criminally indicted, pleading guilty, or found guilty, of FCPA violations in 2009).

82. Lanny A. Breuer, Assistant Att'y Gen., DOJ, Crim. 1 Division, The 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), *available at* http://www.justice.gov/criminal/pr/speeches/2009/11/11-17-09aagbreuer-remarks-fcpa.pdf.

83. *See* Press Release, Former Willbros International Consultant Pleads Guilty to $6 Million Foreign Bribery Scheme (Nov. 12, 2009), *available at* http://www.justice.gov/opa/pr/2009/November/09-crm-1220.html.

84. *See* FCPA Professor, http://fcpaprofessor.blogspot.com/search/label/Paul%20Novak (Nov. 13, 2009, 13:37).

85. Press Release, *supra* note 83.

Other agents or consultants criminally indicted in 2009 include U.K. citizens Jeffrey Tesler and Wojciech Chodan for their alleged roles in the KBR/Halliburton Nigeria scheme[86] and Canadian citizen Ousama Naaman for his role in connection with an Iraqi Oil-For-Food matter.[87] Notwithstanding these indictments, there still exists a widely held misperception that foreign nationals are not subject to the FCPA.[88] But in 1998, the FCPA's antibribery provisions were amended to, among other things, broaden the jurisdictional reach of the statute to prohibit "any person" from making improper payments through "use of the mails or any means or instrumentality of interstate commerce" or from doing any other act "*while in the territory of the United States*" in furtherance of an improper payment.[89] Thus, as to these foreign agents/consultants, the DOJ alleged a U.S. nexus in that e-mail communications concerning the bribe payments were sent through U.S. Internet servers and improper payments passed through U.S. bank accounts.[90]

Another significant development from the 2009 enforcement year is a demonstrated commitment by the DOJ to target "foreign official" recipients of bribe payments. In a November 2009 speech at global anti-corruption conference, Attorney General Eric Holder urged nations to work together to ensure that "corrupt officials do not retain the illicit proceeds of their corruption" and announced a "redoubled commitment on behalf of the [DOJ] to recover" funds obtained by foreign officials through bribery.[91]

Because the FCPA only applies to bribe-payers and not bribe-takers,[92] the FCPA is not a tool in DOJ's pursuit of "foreign officials." But other legal avenues are available to the DOJ to hold "foreign official" bribe recipients accountable as two examples from 2009 demonstrate. In January 2009, in the aftermath of the record-setting Siemens enforcement matter, the DOJ filed a forfeiture action against bank accounts located in Singapore (money in these accounts flowed through U.S. financial institutions) that were used to bribe the

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86. *See* Press Release, Two UK Citizens Charged by United States with Bribing Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme, (Mar. 5, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/03/03-05-09tesler-charged.pdf; *see supra* notes 53, 66 and accompanying text.

87. *See* Press Release, Canadian National Charged with Foreign Bribery and Paying Kickbacks Under the Oil For Food Program (July 31, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09_naaman-indict.pdf.

88. *See* Spahn, *supra* note 6, at 157.

89. *See* 15 U.S.C. § 78dd-3(a) (2006) (emphasis added).

90. *See* Indictment, United States v. Tesler, No. H-09-098 (S.D. Tex. Feb. 17, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/03/03-05-09tesler-indictment.pdf; Indictment, United States v. Naaman, No. 1:08-cr-00246 (D.D.C. Aug. 7, 2008), *available at* http://www.mediafile.com/?ztvyjidxzez.

91. Eric Holder, Att'y Gen., Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html.

92. *See* United States v. Castle, 925 F.2d 831 (5th Cir. 1990).

son of the former Bangladeshi Prime Minister.[93] In announcing the forfeiture action, a DOJ official said that the action "shows the lengths to which U.S. law enforcement will go to recover the proceeds of foreign corruption."[94] The official said that the DOJ will not only prosecute companies and executives who violate the FCPA, but will also use forfeiture laws "to recapture the illicit facilitating payments often used in such schemes."[95] In addition, in December 2009, the DOJ criminally indicted (in what is believed to be a first) two "foreign officials" in connection with an FCPA enforcement action. Robert Antoine and Jean Rene Duperval, among others, were charged with money laundering conspiracy and substantive money laundering given that their U.S. bank accounts were connected with the bribery scheme.[96]

2. The Summer of Trials.—The year of the individual also saw the summer of FCPA trials against individuals. Business entities involved in FCPA enforcement actions have historically shown zero interest in challenging the enforcement agencies' aggressive prosecution theories, holding the agencies to their burden of proof, and enduring the uncertainties of trial. In fact, no business entity has publicly challenged either enforcement agency in an FCPA case in the last twenty years.[97] Thus, corporate FCPA prosecutions are routinely settled through an NPA or DPA. Because an NPA is subject to no judicial scrutiny, and a DPA is subject to no meaningful judicial scrutiny,[98] there is no judicial scrutiny in most FCPA enforcement actions whether factual evidence exists to support each of the legal elements of an FCPA violation. Further, judicial scrutiny of aggressive enforcement theories, upon which so many FCPA enforcement actions are based, is also largely absent.

Individuals involved in an FCPA enforcement action, faced with a loss of liberty, are more inclined to challenge the enforcement agencies and the summer

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93. *See* Complaint, United States v. All Assets Held in the Name of Zasz Trading & Consulting (D.D.C. Jan. 9, 2009), *available at* http://www.fcpaenforcement.com/FILES/tbl_s31Publications/FileUpload137/5602/ForfeitureDOJComplaint.pdf.

94. Press Release, Department of Justice Seeks to Recover Approximately $3 Million in Illegal Proceeds from Foreign Bribe Payments (Jan. 9, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/01/01-09-09foreign-bribes.pdf.

95. *Id.*

96. *See* Indictment, United States v. Joel Esquenazi et al., No. 09-21010 (S.D. Fla. Dec. 4, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/12/12-7fraudhaiti-indict_0.pdf. According to the indictment, Antoine and Duperval are both former Directors of International Relations at Haiti Teleco—the alleged state-owned national telecommunications company—and thus "foreign officials," at least under the enforcement agencies' aggressive interpretation of that term. *Id.*

97. *See* The FCPA Blog, http://www.fcpablog.com/blog/2010/2/10/a-gesture-of-justice.html (Feb. 9, 2010 17:27) ("Not a single corporate defendant, big or small, has fought Foreign Corrupt Practices Act charges in court for the past two decades.").

98. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 12, 25 (2009), *available at* http://www.gao.gov/new.items/d10110.pdf.

of 2009 was the most active trial period in the history of the FCPA.

a. Frederic Bourke and Azerbaijan bribery.—The most noteworthy FCPA trial in 2009 involved Frederic Bourke. The trial centered on Bourke's participation, as an investor, in the privatization of the State Oil Company of the Azerbaijan Republic. This investment was also made by former U.S. Senate Majority Leader George Mitchell and Columbia University (among others), and Bourke reportedly lost $8 million.[99] In July 2009, a federal jury convicted Bourke for conspiring to pay bribes to Azerbaijan officials in a "massive scheme" to bribe according to the DOJ.[100] The DOJ post-verdict press release states that evidence presented at trial established that Bourke "was a knowing participant in a scheme to bribe senior government officials in Azerbaijan with several hundred million dollars in shares of stock, cash, and other gifts."[101] The release further notes that "the bribes were meant to ensure that those officials would privatize [the oil company] in a rigged auction that only Bourke, fugitive Czech investor Viktor Kozeny and members of their investment consortium could win, to their massive profit."[102]

The Bourke case is arguably the most complex and convoluted case in the FCPA's history.[103] The case included a nearly decade long investigation that spanned the globe, dismissal of FCPA substantive charges on statute of limitations grounds, reinstatement of the FCPA substantive charges, a superseding indictment which then dropped the FCPA substantives charges, and a six-week jury trial during which many observers believe that the jury confused the FCPA's "knowledge" standard with negligence.[104] Further, even though Judge Shira Scheindlin denied Bourke's post-verdict motions, she did reject the DOJ's aggressive interpretation of the FCPA's knowledge element.[105] Moreover,

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99. *See* Memorandum of Law in Support of Defendant Frederic Bourke, Jr.'s Post-Trial Motion for Entry of a Judgment of Acquittal Pursuant to FED. R. CRIM. P. 29 or for a New Trial Pursuant to FED. R. CRIM. P. 33 at 3, 25, 33, United States v. Frederic Bourke, Jr., 05 Cri. 518, (Aug. 10, 2009) (on file with author); Chad Abraham, *Bourke Plans Extensive Defense in Oil Scam: Part-time Aspen Resident Met with Azerbaijan Leader*, ASPEN TIMES, Dec. 20, 2005, *available at* http://www.aspentimes.com/article/20051220/NEWS/112200025.

100. Press Release, Connecticut Investor Found Guilty in Massive Scheme to Bribe Senior Government Officials in the Republic of Azerbaijan (July 10, 2009), *available at* http://www.justice.gov/opa/pr/2009/July/09-crm-677.html.

101. *Id.*

102. *Id.*

103. For more on the extensive background of the Bourke case, see Andrew Longstreth, *Azerbaijan Bribes Put One Mogul on Trial, Another in Exile*, LAW.COM (Oct. 9, 2009), *available at* http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202434399273&Azerbaijan_Bribes_Put_One_Mogul_on_Trial_Another_in_Exile.

104. *See, e.g.*, The FCPA Blog, http://www.fcpablog.com/blog/2009/7/20/back-to-bourke.html (July 19, 2009, 20:38); The FCPA Blog, http://www.fcpablog.com/blog/2009/7/14/knowing-what-you-dont-know.html (July 13, 2009, 20:12); The FCPA Blog, http://www.fcpablog.com/blog/2009/7/12/bourkes-verdict-only-in-america.html (July 12, 2009, 19:08).

105. *See* Kenneth Winer & Gregory Husisian, *Recent Opinion Sheds Light on the Relevance*

Judge Scheindlin rejected the ten-year prison sentence sought by the DOJ and sentenced Bourke to 366 days in prison (followed by three years supervised release).[106] At sentencing, even Judge Scheindlin stated that the case troubled her and that after years of supervising the case, it was "still not entirely clear to [her] whether Mr. Bourke is a victim, or a crook, or a little bit of both."[107] Although the trial phase of the Bourke case is over, the case continues on appeal on grounds including the FCPA's "knowledge" element and Bourke remains free on bail.[108]

b. Louisiana Congressman William Jefferson's freezer cash.—The second FCPA trial of the summer of 2009 involved former Louisiana Congressmen William Jefferson. A federal jury *acquitted* Jefferson on a substantive FCPA charge.[109] That charge, according to the criminal indictment, centered on allegations that Jefferson attempted to bribe (with the infamous cash in the freezer[110]) Nigerian officials including the former Nigerian Vice President to assist himself and others obtain or retain business for a Nigerian telecommunications joint venture.[111] But Jefferson was *convicted* of a variety of charges (solicitation of bribes, honest services wire fraud, money laundering, racketeering and conspiracy).[112] Just what conspiracy remains unclear. The indictment charged conspiracy to solicit bribes, to commit honest services wire fraud, and to violate the FCPA, but the jury was instructed that it only needed to find Jefferson guilty on two out of three of those counts and the jury verdict form did not require the jury to specify which counts it agreed upon.[113] The judge

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of Due Diligence to the FCPA's "Knowledge" Element, 4 CORP. ACCOUNTABILITY REP., at 2-3, Nov. 13, 2009, *available at* http://www.foley.com/files/tbl_s31Publications/FileUpload137/6597/CorporateAccount2009.pdf.

106. *See* Press Release, Connecticut Investor Frederic Bourke Sentenced to Prison for Scheme to Bribe Government Officials in Azerbaijan (Nov. 11, 2009) *available at* http://www.justice.gov/opa/pr/2009/November/09-crm-1217.html.

107. Chad Bray, *Bourke Sentenced to One Year in Azerbaijan Bribery Case*, WALL ST. J., Nov. 10, 2009, at B4, *available at* http://online.wsj.com/article/SB10001424052748704402404574528003117098132.html.

108. The FCPA Blog, http://www.fcpablog.com/blog/2009/11/19/Jefferson-and-bourke-are-released-on-bail.html (Nov. 18, 2009, 18:18).

109. *See* Press Release, Former Congressman William J. Jefferson Convicted of Bribery, Racketeering, Money Laundering and Other Related Charges (Aug. 5, 2009), *available at* http://www.justice.gov/opa/pr/2009/August/09-crm-775.html.

110. Dana Milbank, *So $90,000 Was in the Freezer. What's Wrong with That?*, WASH. POST, May 23, 2009, at A2.

111. *See* Press Release, Congressman William Jefferson Indicted On Bribery, Racketeering, Money Laundering, Obstruction of Justice, and Related Charges (June 4, 2007), *available at* http://www.justice.gov/opa/pr/2007/June/07_crm_402.html; *US Probes Nigeria Vice-President*, BBC NEWS, Aug. 29, 2005, *available at* http://news.bbc.co.uk/2/hi/africa/4192186.stm.

112. *See* Press Release, *supra* note 109.

113. *See* Jonathan Tilove, *William Jefferson Case Will Always Be Remembered for Cash in the Freezer*, TIMES-PICAYUNE (New Orleans), Aug. 5, 2009, *available at* http://www.nola.com/news/index.ssf/2009/08/william_jefferson_case_will_al_1.html.

sentenced Jefferson to thirteen years in federal prison and he remains free on bail pending his appeal.[114] Notwithstanding the fact that a jury found Jefferson not guilty of substantive FCPA charges and notwithstanding the ambiguous nature of the jury's conspiracy verdict, the DOJ still maintains that Jefferson was found guilty of FCPA violations.[115]

c. Gerald and Patricia Green's Thailand film festival bribes.—The third FCPA trial of the summer of 2009 involved Los Angeles-area entertainment executives Gerald and Patricia Green. A federal jury convicted the Greens of substantive FCPA violations, conspiracy to violate the FCPA, and other charges.[116] According to the DOJ post-verdict release, evidence introduced at trial showed that "beginning in 2002 and continuing into 2007, the Greens conspired with others to bribe the former governor of the [Tourism Authority of Thailand (TAT)] in order to get lucrative film festival contracts as well as other TAT contracts."[117] The Greens await sentencing.[118]

These trials were indeed rare and the fact remains that every corporate FCPA enforcement action over the last two decades has been resolved without a trial and nearly every FCPA individual enforcement action has also been resolved without a trial. If nothing else, the FCPA trials in 2009 demonstrate that when a FCPA enforcement action is challenged, the DOJ is not infallible when enforcing the FCPA, that its aggressive interpretations of the statute will not be universally accepted, and that even judges remain fuzzy as to the dividing line between aggressive business conduct and conduct that violates the FCPA.

D. Aggressive and Untested Enforcement Theories

Ordinarily, aggressive government enforcement of a statute based on tenuous, dubious, and in some cases untested legal theories invites judicial scrutiny in a transparent, adversarial proceeding in which the government must meet its burden of proof and establish that factual evidence exists to support the applicable legal elements and in which valid and legitimate defenses are presented. Such judicial

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114. *See* Press Release, Former Congressman William J. Jefferson Sentenced to 13 Years in Prison for Bribery and Other Charges (Nov. 13, 2009), *available at* http://www.justice.gov/opa/pr/2009/November/09-crm-1231.html; The FCPA Blog, *supra* note 108.

115. For instance, in a November 2009 speech Breuer stated: "In the past few months, we have the completed the trials of the Greens in California, of Mr. Bourke in New York and of former Congressman William Jefferson in Virginia. In each of these cases, individuals were found guilty of FCPA violations and face jail time." Lanny A. Breuer, Assistant Att'y Gen., DOJ, Criminal Division, Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), *available at* http://www.justice.gov/criminal/pr/speeches/2009/11/11-12-09breuer-pharmaspeech.pdf.

116. Press Release, Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts (Sept. 14, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/09/09-14-09green-guily.pdf.

117. *See id.*

118. The FCPA Blog, http://fcpablog.com/blog/2010/1/22/sentencing-respite-for-the-greens.html (Jan. 21, 2010, 17:38).

scrutiny is particularly appropriate when enforcement theories result in multi-million dollar corporate fines and penalties, as is often the case in FCPA enforcement actions.

But such judicial scrutiny is essentially non-existent in the FCPA context given the frequency in which FCPA enforcement actions are resolved through NPAS, DPAs, pleas, or SEC settlements. The result in many cases is that the FCPA means what the enforcement agencies say it means. This feature of the FCPA that distinguishes FCPA enforcement from nearly every other area of law, and this feature was once again prominent during the 2009 FCPA enforcement year.

1. "Foreign Official."—The lack of judicial scrutiny of FCPA enforcement actions is most troubling in connection with the enforcement agencies' aggressive interpretation of the key "foreign official" element of an FCPA antibribery violation. As described in Part I above,[119] the enforcement agencies' interpretation of this element includes the theory that all employees (regardless of title or position) of foreign SOEs, including SOE subsidiaries, are deemed "foreign officials" under the FCPA on the theory that such entities are "instrumentalities" of a foreign government.

The enforcement agencies' interpretation of the "foreign official" element is just that, an interpretation, and it has never been accepted by a court. This interpretation is no different than the DOJ or the SEC telling you that the person you play softball with on Thursday nights is a U.S. "official" merely because he or she works for General Motors or American International Group, Inc., given that both companies are owned or controlled by the U.S. government.

This dubious interpretation is far from an academic issue-spotting exercise, but is rather at the core of a majority of 2009 corporate FCPA enforcement actions as demonstrated by the chart below which lists the enforcement actions along with the alleged "foreign official(s)."

2009 Corporate FCPA Enforcement Actions—The "Foreign Officials"

Company	**"Foreign Official(s)"**
Avery Dennison Corp.[120]	Chinese foreign officials including: "Traffic Management Research Institute under the Ministry of Public Security located in Wuxi, Jiangsu Province;" "an official at Henan Luqiao, a state-owned enterprise;" "a state-owned end user," Indonesian customs and tax officials, and Pakistani customs officials.

119. *See supra* text accompanying notes 16-21.

120. Complaint, *supra* note 49, ¶¶ 2, 9, 13-14, 16-17.

Control Components, Inc.[121]	Alleged Vice President, Engineering Managers, General Managers, Procurement Managers, and Purchasing Officers at state-owned entities including, but were not limited to: "Jiangsu Nuclear Power Corporation (China), Guohua Electric Power (China), China Petroleum Materials and Equipment Corporation . . . . PetroChina, Dongfang Electric Corporation (China), China National Offshore Oil Company . . . Korea Hydro and Nuclear Power . . . Petronas (Malaysia), and National Petroleum Construction Company (United Arab Emirates) . . . ."
Helmerich & Payne Inc.[122]	"Various officials and representatives of the Argentine and Venezuelan customs services."
ITT Corp.[123]	"Employees of numerous Chinese state-owned entities;" "thirty-two different SOE customers;" "employees of Design Institutes (some of which were SOEs) that assisted in the design of large infrastructure projects in China."
KBR/Halliburton Co.[124]	"High-level Nigerian government officials;" "Nigerian government officials;" "The Nigerian National Petroleum Corporation (NNPC) was a Nigerian government-owned company charged with development of Nigeria's oil and gas wealth and regulation of the country's oil and gas industry. NNPC was a shareholder in certain joint ventures with multinational oil companies. NNPC was an entity and instrumentality of the Government of Nigeria . . ."; "Nigeria LNG Limited (NLNG) was created by the Nigerian government . . . and was the entity that awarded the related . . . contracts. The largest shareholder of NLNG was NNPC, which owned 49% of NLNG. The other owners of NLNG were multinational oil companies. Through the NLNG board members appointed by NNPC, among other means, the Nigerian government exercised control over NLNG . . . NLNG was an entity and instrumentality of the Government of Nigeria . . . ."

121. Criminal Information, *supra* note 50, ¶ 5.

122. Helmerich & Payne, Inc., *supra* note 35, ¶ 4.

123. Complaint, *supra* note 52, ¶¶ 1, 10.

124. Criminal Information, *supra* note 14, ¶¶ 10-14, 18; Complaint, *supra* note 53, ¶¶ 10, 14, 24.

Latin Node Inc.[125]	"Hondutel, the Honduran government-owned telecommunications company headquartered in Tegucigalpa, Honduras, was an 'instrumentality' of the Honduran government, and thus its employees and directors were 'foreign officials' under the FCPA. . . . TeleYemen, the Yemeni government-owned telecommunications company headquartered in Sana'a, Yemen, was an 'instrumentality' of the Yemeni government, and thus its employees and directors were 'foreign officials' under the FCPA."
Nature's Sunshine Products, Inc.[126]	"Brazilian customs brokers."
United Industrial Corp.[127]	"[A]ctive [Egyptian Air Force] officials."
UTStarcom, Inc.[128]	"Government-controlled municipal and provincial telecommunications companies's employees;" "employees of Chinese government-controlled telecommunications companies;" "managers and other employees of 9 government customers in China;" "a Chinese-government-controlled telecommunications company." "A government-controlled telecommunications company in Thailand;" "One Mongolian government official to help UTSI obtain a favorable ruling in a dispute over its license."

As demonstrated by the above chart, the enforcement agencies' interpretation of the key "foreign official" element of an FCPA antibribery violation to include SOE employees was at the core of 66% (six out of nine) of the 2009 FCPA enforcement actions against business entities. Further, because many of the above enforcement actions (most notably Control Components Inc.) resulted in several related actions against employees where the "foreign officials" were the exact same,[129] the impact of this tenuous and dubious legal interpretation extends far beyond just the enforcement actions profiled above.

The most aggressive application of the enforcement agencies "foreign official" interpretation was in the KBR / Halliburton enforcement action in which the enforcement agencies alleged that officers and employees of Nigeria LNG Limited were "foreign officials" despite the fact that NLNG is owned 51% by a

125. Criminal Information, *supra* note 54, ¶¶ 6, 11.

126. Complaint, *supra* note 35, ¶ 6.

127. *In re* United Indus. Corp., Exchange Release No. 60005 (May 29, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf.

128. Complaint, *supra* note 15.

129. *See supra* note 121 and accompanying text.

consortium of private multinational oil companies—Shell, Total, and Eni.[130] In other words, even if an entity is undeniably majority owned by private companies, the enforcement agencies will not retreat from its tenuous and dubious legal interpretation that employees of that entity are "foreign officials" under the FCPA.

DOJ officials have publicly acknowledged that there can be difficult assessments of who qualifies as a "foreign official" under the FCPA.[131] Despite this difficult assessment and despite the lack of any FCPA case law to support its position, the enforcement agencies continue to aggressively interpret the "foreign official" element and have steadfastly refused to provide useful guidance on this issue to those subject to the FCPA.[132] For instance, in a November 2009 speech (before a pharmaceutical industry audience—an industry which has become subject to much FCPA scrutiny based on the interpretation), Breuer said:

> consider the possible range of "foreign officials" who are covered by the FCPA: Some are obvious, like health ministry and customs officials of other countries. But some others may not be, such as the doctors, pharmacists, lab technicians and other health professionals who are employed by state-owned facilities. Indeed, it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a "foreign official" within the meaning of the FCPA.[133]

Even if the enforcement agencies' aggressive "foreign official" interpretation were to be upheld by a court, those subject to the FCPA could certainly benefit from some clarity as to the factors the enforcement agencies consider when analyzing whether a commercial enterprise (often times a company with publicly traded stock and other attributes of private business) is an SOE.

Instead, in many cases the charging documents contain little more than mere conclusory legal statements as to the key "foreign official" element. For instance, the SEC's complaint against Oscar Meza, a former employee of Faro Technologies, Inc., charging FCPA anti-bribery violations, is silent as to any factual evidence supporting the theory that employees of unidentified "Chinese state-owned companies" are "foreign officials."[134] Similarly, in the above-profiled Control Components Inc. action, it is unclear what attributes of the identified entities, such as Petronas (located in Malaysia), made them an "instrumentality" of a foreign government in the eyes of the enforcement

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130. *See* The Company—Nigeria LNG, http://www.nlng.com/NR/exeres/F48DE9A7-F3F3-4A8E-929A-0C34F1CFF92B%2Cframeless.htm (last visited Mar. 9, 2010).

131. *See* Wrage Blog, http://wrageblog.org/2009/09/17/the-latest-fcpa-forecast-from-u-s-regulators/ (Sept. 17, 2009, 14:26).

132. Breuer, *supra* note 115.

133. *Id.*

134. *See* Complaint ¶ 1, SEC v. Oscar H. Meza, No. 1:09-cv-01648 (D.D.C. Aug. 28, 2009), *available at* http://www.sec.gov/litigation/complaints/2009/comp21190.pdf.

agencies.[135]

It remains an open question also whether the enforcement agencies conduct any meaningful investigation before making the significant legal conclusion that a seemingly commercial enterprise is nevertheless an "instrumentality" of a foreign government. For instance, Petronas is "a fully-integrated oil and gas corporation, ranked among Fortune Global 500's largest corporations in the world"; it has four subsidiaries listed on a stock exchange; and it has ventured globally into more than thirty-two countries worldwide in its aspiration to be "a [l]eading [o]il and [g]as [m]ultinational of [c]hoice."[136] Would a court conclude that such a profit seeking enterprise, one of the largest in the world, and one that does business all over the world is truly an instrumentality of the Malaysian government?

Why has no one challenged this interpretation of the key "foreign official" element (the foundation on which a significant number of FCPA enforcement actions is based)? Simply put, businesses are not in the business of setting legal precedent and to challenge this interpretation would first require a business to be criminally indicted—something no board of director member is going to allow to happen in this post-Arthur Anderson world—regardless of the ultimate criminal fine or penalty the DOJ is seeking.[137]

Thus, this interpretation continues even though it is beyond ripe for challenge. With foreign government owned sovereign wealth funds making investments around the world (including in U.S. companies)[138] and with SOEs listing public shares on various exchanges and otherwise doing business around the world, there has never been a more critical time for the enforcement agencies to make clear its legal reasoning and support for its tenuous and dubious legal theory. Before another company or individual is subject to an FCPA enforcement based on this tenuous and dubious legal theory, there should be at least be some judicial acceptance of this theory.

2. "Control Person" Liability.—The 2009 FCPA enforcement year also saw the SEC push the outer limits of FCPA liability. In the Nature's Sunshine Products (NSP) enforcement action, the SEC also charged company executives Douglas Faggioli and Craig Huff.[139] The settled complaint alleges that Faggioli and Huff, as "control persons" of NSP, violated the FCPA books and records and internal control provisions.[140] In language that is sure to induce a cold sweat in

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135. *See supra* note 121 and accompanying text.

136. About Petronas, www.petronas.com.my/about_US.aspx (last visited Mar. 26, 2010).

137. *See, e.g.*, Winer & Husisian, *supra* note 37, at 10 ("Even if the government's application of the anti-bribery provisions of the FCPA is excessively aggressive, no company or individual wants to have to test the government's application in court.").

138. *See, e.g.*, Dinny McMahon, *China Gives Glimpse of U.S. Holdings*, WALL ST. J., Feb. 9, 2010, at C1 (noting that stated-owned China Investment Corp. has a combined $9.63 billion in equity stakes in various U.S. companies including American International Group, Inc., Apple Inc., and News Corp.).

139. Complaint, *supra* note 35.

140. *Id.* ¶¶ 43-48, 69.

any executive, the SEC generally alleged that both Faggioli and Huff had "supervisory responsibilities" over NSP's senior management and policies. Yet as "control persons," the SEC alleged that Faggioli and Huff "failed to make and keep books, records and accounts, which in reasonable detail, accurately and fairly reflected the transactions of NSP" and that they failed to devise and maintain an adequate system of internal accounting controls.[141]

Although the SEC has in past FCPA enforcement actions charged business executives under other indirect theories of liability,[142] the charges against Faggioli and Huff are the first time the SEC has used a "control person" theory of liability in an FCPA enforcement action. Phillip Urofsky, a former DOJ attorney responsible for prosecuting FCPA cases currently in private practice, noted that the NSP case is the "first FCPA action in which the SEC has charged individuals under the Exchange Act's control liability theory."[143] He also noted that this case departed from the SEC's prior practice in that previous SEC FCPA cases included "direct allegations that the individuals . . . charged were involved in the action, in creating the false books and records or creating controls or authorizing payment of the bribes."[144] Urofsky calls the SEC's invocation of control person liability in the FCPA context "unique and unprecedented."[145] As demonstrated by the NSP enforcement action, the FCPA enforcement trend is clearly greater scrutiny of business executives and a greater SEC expectation that executives play a meaningful role in ensuring enterprise-wide FCPA compliance.

III. THE ROAD AHEAD FOR THE FOREIGN CORRUPT PRACTICES ACT

As the FCPA enters a new decade, the Obama Department of Justice is expected to keep FCPA enforcement a top priority. Not only is the United States expected to ramp-up enforcement of the FCPA, but other countries, most notably the United Kingdom, are also expected to ramp-up enforcement of anti-corruption laws as well.[146] This Section ends with a discussion of two bills currently in the U.S. Congress that could affect FCPA compliance and enforcement in the new decade.

A. Enforcement Priority Remains High

FCPA prosecution is expected to remain a top priority in the Obama administration and thus a prominent feature on the legal landscape throughout this decade. Both Attorney General Holder and Assistant Attorney General

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141. *Id.* ¶¶ 67-69.

142. *See* FCPA Professor, http://fcpaprofessor.blogspot.com/2009/08/more-on-control-person-and-similar.html (Aug. 25, 2009, 15:42).

143. Amanda Bronstad, *SEC Trots Out a New Weapon: Control Person Liability*, NAT'L L.J., Aug. 20, 2009, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433157801&hbxlogin=1.

144. *Id.*

145. *Id.*

146. *See infra* notes 150-53 and accompanying text.

Breuer come from a white collar defense background and have familiarity with the statute. The DOJ's increased focus on the FCPA has been documented over the past few years. In his November 2009 speech, Breuer noted that the DOJ "will continue to focus [its] attention on areas and on industries where we can have the biggest impact in reducing foreign corruption."[147] Breuer noted that the FCPA-specific FBI squad "has been growing in size and in expertise over the past two years." He announced that the DOJ has "begun discussions with the Internal Revenue Service's Criminal Investigation Division about partnering with [the DOJ] on FCPA cases" as well as "pursuing strategic partnerships with certain U.S. Attorney's Offices throughout the United States where there are a concentration of FCPA investigations."[148]

The SEC has also ramped up its FCPA resources. In August 2009, Robert Khuzami (the SEC's Director of the Division of Enforcement), announced that the SEC will be creating a specialized FCPA unit. Khuzami said:

> The Foreign Corrupt Practices Act unit will focus on new and proactive approaches to identifying violations of the Foreign Corrupt Practice Act, which prohibits U.S. companies from bribing foreign officials for government contracts and other business. While we have been active in this area, more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations.[149]

B. Increased International Enforcement

The past year also saw an enforcement ramp up of anti-corruption laws around the globe, including most notably in the United Kingdom. In July 2009, the U.K. Serious Fraud Office (SFO) (an enforcement agency similar to the DOJ) announced the first prosecution brought in the United Kingdom against a company for overseas corruption as it charged Mabey & Johnson Ltd. with making improper payments to secure public contracts in Jamaica and Ghana as well as in connection with the Iraqi Oil-For-Food program.[150] In October 2009, Halliburton announced that the SFO is conducting an inquiry into M.W. Kellogg Company (a U.K. joint venture owned by a Halliburton affiliate) related to the same Nigeria scheme at issue in the record-setting FCPA enforcement action.[151]

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147. Breuer, *supra* note 82.

148. *Id.*

149. Robert Khuzami, Director, Div. of Enforcement, SEC, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch080509rk.htm

150. *See* Press Release, Mabey & Johnson Ltd Prosecuted by the SFO (July 10, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-prosecuted-by-the-sfo.aspx.

151. *See* Halliburton Co., Transition Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, Form 10-Q, Comm'n File No. 001-03492, at 10 (Sept. 30, 2009), *available at* http://ir.halliburton.com/phoenix.zhtml?c=67605&p=irol-secText&TEXT=aHR0cDovL2Nj

Such parallel or "tag-along" enforcement actions in other jurisdictions as to the same core conduct at issue in a U.S. FCPA prosecution is expected to become a new norm in this decade.

Also relevant to the U.K.'s enforcement ramp up is a new Bribery Bill expected this year.[152] In anticipation of this new law, in July 2009 the SFO released a memo titled "Approach of the Serious Fraud Office to Dealing with Overseas Corruption" in which the SFO announced that it will be using "all of the tools at [its] disposal in identifying and prosecuting cases of corruption" as well as adopting investigative strategies similar to the DOJ.[153]

Other global anti-corruption developments in 2009 include the announcement by Canadian authorities of a "special unit" dedicated to investigating international bribery and enforcing its FCPA-like statute (the Corruption of Public Officials Act)[154] as well as the Securency International investigation in Australia which could result in that country's first prosecution of a company for foreign bribery.[155]

C. Legislative Activity

Congress enacted the FCPA in 1977 and amended it in 1988 and 1998.[156] Given this approximate ten-year cycle, the statue would seem primed for a tune-up and the current year may see some U.S. legislative activity, as two bills currently in Congress could impact FCPA compliance and enforcement.

1. The Energy Security Through Transparency Act.—In September 2009, "The Energy Security Through Transparency Act" (S-1700) was introduced and it seeks to amend section 13 of the Securities Exchange Act by adding a new section "Disclosure of Payment by Resource Extraction Issuers."[157]

Bribery and corruption are bad; however, that does not mean that every attempt to curtail bribery and corruption is good. Although perhaps a well-intentioned bill, S. 1700 is, as described below, so broad that it would essentially require "Resource Extraction Issuers" to disclose any payments made to just

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152. *See, e.g.*, Bribery Bill, 2009-10, H.L. Bill [69] (U.K.), *available at* http://services.parliament.uk/bills/2009-10/bribery.html.

153. Approach of the Serious Fraud Office to Dealing with Overseas Corruption, *available at* http://www.sfo.gov.uk/media/28313/approach of the SFO to dealing with overseas corruption.pdf.

154. *See* Mark Morrison et al., *Canada's Corruption of Foreign Public Officials Act: What You Need to Know and Why*, BLAKES BULL.: WHITE COLLAR CRIME, Sept. 2009, at 1, *available at* http://www.blakes.com/english/legal_updates/white_collar_crime/sept_2009/CFPOA.pdf.

155. Richard Baker & Nick McKenzie, *When the Buck Stops at the Top*, AGE (MELBOURNE), Nov. 28, 2009, *available at* http://www.theage.com.au/national/when-the-buck-stops-at-the-top-20091127-jx1l.html.

156. Legislative History, http://www.justice.gov/criminal/fraud/fcpa/history (last visited Mar. 9, 2010).

157. *See* Energy Security Through Transparency Act of 2009, S. 1700, 111th Cong. sec. 6 (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s111-1700 (follow "full text" hyperlink).

about anybody in connection with the "commercial development of oil, natural gas, or minerals"—including perfectly legitimate and legal payments.

Under this proposed act, the SEC shall issue final rules that would require:
• a "Resource Extraction Issuer"(a defined term which means an issuer that: "(i) is required to file an annual report with the Commission; and (ii) engages in the commercial development of oil, natural gas, or minerals");
• to include in its annual report;
• "information relating to any payment";
• made by the issuer, "a subsidiary or partner" of the issuer, "or an entity under the control of the issuer";
• to a "foreign government" (a defined term which means a "foreign government, an officer or employee of a foreign government, an agent of a foreign government, a company owned by a foreign government, or a person who will provide a personal benefit to an officer of a government if that person receives a payment, as determined by the [SEC]");
• for "the purpose of the commercial development of oil, natural gas, or minerals."[158]

The final rules to be issued by the SEC would require that the annual report include: "(i) the type and total amount of such payments made for each project" of the issuer "relating to the commercial development of oil, natural gas, or minerals; and (ii) the type and total amount of such payments made to each foreign government."[159] Thereafter, the Act requires that "to the extent practicable, the [SEC] shall make available online, to the public, a compilation of the information required to be submitted" under the above rules.[160]

Under the act, a "Resource Extraction Issuer" is defined to mean an issuer that "engages in the commercial development of oil, natural gas, or minerals."[161] The term "commercial development of oil, natural gas, or minerals" in turn "includes the acquisition of a license, exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, as determined by the [SEC]."[162]

A significant question posed by these broad definitions, among others, is whether selling equipment to a core resource extraction company, which is then used to explore for oil, natural gas, or minerals a "significant action relating to oil, natural gas, or minerals?" Or is selling exploration software to a core resource extraction company, which is then used to explore for oil, natural gas, or minerals a "significant action relating to oil, natural gas, or minerals?"

Further, under the act, the term payment: "(i) means a payment that is (I) made to further the commercial development of oil, natural gas, or minerals; and (II) not de minimis; and (ii) includes taxes, royalties, fees, licenses, production entitlements, bonuses, and other material benefits, as determined by the

158. *Id.* sec. 6(m)(1)-(2).
159. *Id.* sec. 6(m)(2)(A).
160. *Id.* sec. 6(m)(3)(A).
161. *Id.* sec. 6(m)(1)(D)(ii).
162. *Id.* sec. 6(m)(1)(A).

[SEC]."[163]

Ignoring the imperfect and imprecise definition of "Resource Extraction Issuer," it is one thing to require such issuers to disclose royalties paid to a foreign government. But the act seeks disclosure and reporting of much more. The act could conceivably require disclosure of every single dollar a "Resource Extraction Issuer" pays to anybody in connection with the "commercial development of oil, natural gas, or minerals" if the money ultimately makes its way to a foreign government, an officer or employee of a foreign government, a company owed by a foreign government, or any person who will provide a personal benefit to an officer of a government.

Further problematic is the fact that S-1700 does not contain a knowledge requirement. Thus, a "Resource Extraction Issuer" will have a disclosure obligation if it makes a payment to any person, who then unbeknownst to the "Resource Extraction Issuer," makes a payment to a person "who will provide a personal benefit to an officer of a government."[164]

Not only is S-1700 incredibly broad and in many cases unintelligible, but it also seeks to impose disclosure obligations on issuers (at least Resource Extractions issuer) that Congress considered and rejected when it enacted the FCPA. For instance, the original versions of what became the "FCPA" (i.e. the "Foreign Payments Disclosure Act" and other similar bills) started out with disclosure provisions, including provisions requiring all U.S. companies to disclose all payments over $1,000 to any foreign agent or consultant and any and all other payments made in connection with foreign government business.[165] As to these proposed disclosure provisions, many lawmakers, including most notably Senator Proxmire (a Democrat from Wisconsin and a congressional leader on the FCPA issue), were concerned that the disclosure obligations were too vague to enforce and would require the disclosure of thousands of payments that were perfectly legal and legitimate. Proxmire said during congressional hearings: "I would think [the corporations subject to the disclosure requirements] would want some certainty. They want to know what they have to report and what they don't have to report. They don't want to guess and then find themselves in deep trouble because they guess wrong."[166]

The final House report on what would become the "FCPA" is even more emphatic in rejecting a disclosure regime contemplated by S-1700. The report states (when discussing the various disclosure provisions previously debated, but rejected):

> Most disclosure proposals would require U.S. corporations doing business abroad to report all foreign payments including perfectly legal payments such as for promotional purposes and for sales commissions.

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163. *Id.* sec. 6(m)(1)(C)(i)-(ii).

164. *Id.* sec. 6(m)(1)(B).

165. Prohibited Bribes to Foreign Officials: Hearing on S. 3133, 3379, & 3418 Before the Committee on Banking, Housing and Urban Affairs, 94th Cong. 13 (1976) (statement of William Proxmire, Committee Chairman, Committee on Banking, Housing and Urban Affairs).

166. *Id.*

> A disclosure scheme, unlike outright prohibition, would require U.S. corporations to contend not only with an additional bureaucratic overlay but also with massive paperwork requirements.[167]

2. The Foreign Business Bribery Prohibition Act.—The other bill currently in Congress is H.R. 2152 ("The Foreign Business Bribery Prohibition Act") and it could be a game-changer in terms of creating the much-needed FCPA case law to define the statute's contours.[168] At present, there is no private right of action under the FCPA. Enforcement of the law is solely in the hands of the DOJ and SEC.[169] The act, introduced in April 2009, seeks to amend the FCPA by creating a private right of action for any U.S. company that can prove it lost business because a "foreign concern" gained that same business by violating the FCPA.[170]

Under the act, a plaintiff would need to prove that: (i) the "foreign concern" violated the FCPA's anti-bribery provisions; and (ii) the violation prevented the plaintiff from obtaining or retaining business and assisted the foreign concern in obtaining or retaining business.[171] In other words, if a U.S. company can prove that it lost business because a "foreign concern" gained that same business by violating the FCPA, the U.S. company could bring a lawsuit seeking damages. Under the proposed act, the damages would be the higher of the total amount of the contract or agreement that the "foreign concern" gained in obtaining or retaining the business or the total amount of the contract or agreement that the plaintiff failed to gain.[172] The act also allows treble damages along with attorneys' fees and costs.[173]

With increased media scrutiny on the business practices of foreign companies, including allegations that certain companies have been able to obtain or retain business by making bribe payments,[174] the act could provide U.S. companies a legal avenue to recover for such lost business.

The act also has the potential to change FCPA enforcement by creating an avenue for much needed judicial scrutiny of the FCPA's elements. Because a private plaintiff will have to prove the same elements enforcement agencies have to establish to initiate an FCPA enforcement action, and because a private plaintiff would not carry the "big stick" the enforcement agencies carry, FCPA

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167. H.R. REP., *supra* note 17, at 3.

168. *See* Foreign Business Bribery Prohibition Act of 2009, H.R. 2152, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h111-2152 (follow "full text" hyperlink).

169. *See* Lamb v. Philip Morris, Inc., 915 F.2d 1024, 1029-30 (6th Cir. 1990).

170. *See* H.R. 2152, sec. 2 (f)(1).

171. *See id.*

172. *See id.* sec. 2(f)(3).

173. *See id.* sec. 2(f)(3)(b).

174. *See* Sharon LaFraniere & John Grobler, *China Spreads Aid in Africa, with a Catch*, N.Y. TIMES, Sept. 21, 2009, at A1, *available at* http://www.nytimes.com/2009/09/22/World/Africa/22nambia.html; *see also* Joshua Partlow, *Afghan Minister Accused of Taking Bribe*, WASH. POST, Nov. 18, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/11/17/AR2009111704198_pf.html.

case law, as opposed to merely FCPA resolutions via NPAs or DPAs, surely seems likely if Congress enacts H.R. 2152. Thus, if Congress enacts H.R. 2152, it could inject a plaintiff's component into the FCPA bar, and result in much needed substantive FCPA case law.[175]

175. *See* United States v. Kozeny, 493 F. Supp. 2d 693, 697 (S.D.N.Y. 2007) (noting the "surprisingly few decisions throughout the country on the FCPA over the course of the last thirty years").

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BOOK REVIEW

REVIEW ESSAY: THE DISINTEGRATION OF THE IDEA OF HUMAN RIGHTS

R. GEORGE WRIGHT*

NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS (Princeton Univ. Press 2008).

INTRACTABLE DISPUTES ABOUT THE NATURAL LAW: ALASDAIR MACINTYRE AND CRITICS (Lawrence S. Cunningham ed., Univ. of Notre Dame Press 2009).

MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS (Cambridge Univ. Press 2007).

JAMES GRIFFIN, ON HUMAN RIGHTS (Oxford Univ. Press 2008).

G.A. COHEN, RESCUING JUSTICE AND EQUALITY (Harvard Univ. Press 2008).

MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? (Farrar, Straus & Giroux 2009).

CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS (Oxford Univ. Press 2009).

INTRODUCTION

It is widely,[1] though hardly universally,[2] held that the promotion and defense of human rights precisely as human rights, is desirable as a matter of morality,

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1. *See, e.g.*, MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS 4 (Cambridge Univ. Press 2007) (arguing that "[a]lthough it is only one morality among many, the morality of human rights has become the dominant morality of our time"); *see also* The 1948 Universal Declaration of Human Rights (1948), http://www.un.org/en/documents/udhr.

2. *See, e.g.*, Richard Rorty, *Human Rights, Rationality, and Sentimentality*, *in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 111 (Stephen Shute & Susan Hurley eds., 1993); Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758 (2008) (seeking to distinguish and focus in practice on the promotion of human welfare rather than human rights). We set aside for the moment any broader philosophical or scientific position that is plainly incompatible with typical understandings of human rights. For one example of such a materialist view, see *infra* note 84. For a somewhat different perspective, consider the well-regarded novelist Mary Gordon: "[W]e say we believe 'all men are created equal,' but we don't live, we probably don't even want to live, as if it were true." MARY GORDON, READING JESUS: A WRITER'S ENCOUNTER WITH THE GOSPELS 93 (2009). For an attempt to combine a form of relativism with Kantian or Aristotelian approaches, see STEVEN LUKES, MORAL RELATIVISM 158-59 (2008).

law, and policy. But what if the very idea of a defensible human right is, in various ways, disintegrating before us? This Review explores this possibility.

The past few years have seen the publication of a remarkable number of deeply considered books on the theories of human rights, basic justice, and related subjects. The particular books listed above and briefly referred to below, as much as they vary among themselves, all fit within this category. The reader of this Review must be forewarned that none of these books focuses centrally on the question of the disintegration of the idea of a defensible human right, the theme of this Review. Broader and lengthier synopses of each of the books are but a few clicks away. But if the idea of a human right is indeed in the process of unraveling, that fact alone is worth noting.

Out of respect for the respective book authors and the readers of this Review, however, we will consider each book separately and in turn, as opposed to merely swirling each throughout, as fragments in a thematic essay. Each book will be introduced, but the depth of scholarship, care, and subtlety in argumentation, and the sheer breadth of scope of each will preclude fair summary herein.

Nor does any uniquely best order of presentation suggest itself, even for the sake of establishing our disintegrationist theme. Let us therefore simply begin with what is in some ways the most metaphysically ambitious and academically controversial treatment, that of the distinguished philosopher Nicolas Wolterstorff.

I. WOLTERSTORFF'S EXPLICIT THEISM

Nicholas Wolterstorff argues that there are genuine human rights only because, or only if, there is a God of a traditional sort who "bestows" the necessary sort of worth on human beings through God's permanent and equal "attachment" love for every human being.[3] Human rights are thus not fundamentally a matter of a divine command,[4] nor do they exist because of any

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3. The very heart of Wolterstorff's obviously broader and more nuanced account is found at NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS 352-61 (Princeton Univ. Press 2008) [hereinafter WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS]. For a highly condensed partial version, see Nicholas Wolterstorff, *Can Human Rights Survive Secularization?*, 54 VILL. L. REV. 411 (2009). For discussion, see Richard J. Bernstein, *Does He Pull It Off? A Theistic Grounding of Natural Inherent Human Rights?*, 37 J. RELIGIOUS ETHICS 221 (2009); Mark C. Murphy, Book Review, 119 ETHICS 402 (2009); Paul Weithman, *God's Velveteen Rabbit*, 37 J. RELIGIOUS ETHICS 243 (2009); Nicholas Wolterstorff, *Justice as Inherent Rights: A Response to My Commentators*, 37 J. RELIGIOUS ETHICS 261 (2009) [hereinafter Wolterstorff, *Justice as Inherent Rights*] (responding in particular to Bernstein and Weithman, *supra*), as well as the brief reviews by Daniel A. Dombrowski, Book Review, 89 J. RELIGION 278 (2009) and Richard W. Garnett, *Righting Wrongs and Wronging Rights*, 186 FIRST THINGS 48 (2008).

4. For a sampling of the variety and sophistication of Divine Command (or Divine Preference) theories of ethics more broadly, see, for example, ROBERT MERRIHEW ADAMS, FINITE AND INFINITE GOODS: A FRAMEWORK FOR ETHICS (1999); THOMAS L. CARSON, VALUE AND THE GOOD LIFE (2000); MARK C. MURPHY, AN ESSAY ON DIVINE AUTHORITY (2002); LINDA TRINKAUS

inherent quality or capacity humans possess,[5] nor are there adequate secular grounds for a belief in equal and universal human rights.[6]

To shed light on the idea of God's attachment love for human beings, Wolterstorff refers to the case of a child whose fondness and attachment for a particular teddy bear is not, and perhaps never was, dependent upon any inherent qualities of the bear in question.[7] We may assume the child's attachment love or bonding to persist despite, or even because of, the bear's now undeniably tattered, raggedy condition. Independent of the child's attachment love, we might see no reason not to consign the otherwise undistinguished, fungible, perhaps even unwholesome bear to the dumpster.

But if we choose to preserve and maintain the bear, our doing so may reflect more than mere sentimentality or even empathy for the child. We may sensibly believe that although we would, of course, not be wronging the bear itself in disposing of it, we might well be genuinely wronging the child.

We must now replace the parties in this case with their counterparts. The raggedy, intrinsically undistinguished bear corresponds, at least in some loose sense, to every human being. The potential discarder of the raggedy bear becomes any person or entity that might choose to violate the human rights of any human being. And for the child, we substitute a God who loves all human beings, whatever their defects and impairments, universally, equally, and permanently, in a way that bestows or confers worth on all such persons, of a sort that grounds their human rights.

Wolterstorff is careful to emphasize that he has not tried to show the existence of the necessary sort of God.[8] His argument for human rights is thus hypothetical, or contingent upon theistic commitments not argued for. Certainly,

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ZAGZEBSKI, DIVINE MOTIVATION THEORY (2004); Philip L. Quinn, *Divine Command Theory*, *in* THE BLACKWELL GUIDE TO ETHICAL THEORY 53 (Hugh LaFollette ed., 2000). For discussion of an earlier perspective, see Peter King, *Ockham's Ethical Theory*, *in* THE CAMBRIDGE COMPANION TO OCKHAM 227 (Paul Vincent Spade ed., 1999).

5. *See, e.g.*, WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS, *supra* note 3, at 352, and more generally at 348-61. Wolterstorff thus does not rely heavily on the traditional idea of the *imago dei*, or of all humans being created in the relevant image and likeness of God. *See id.* at 348-52 and *infra* note 6.

6. *See* WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS, *supra* note 3, at 323-41 (discussing in succession the proposals of Immanuel Kant, Ronald Dworkin, and Alan Gewirth). The general, overarching response is roughly that all the secular properties we might point to are either insufficiently meaningful to bear the weight, or are not shared by all humans, or plainly come in degrees in such a way as to undermine equality of rights. For further discussion, see JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT (1999); JEREMY WALDRON, GOD, LOCKE, AND EQUALITY (2002).

7. *See* WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS, *supra* note 3, at 359-60.

8. *See id.* at 360-61. For what amounts at least roughly to an attempt along those lines, based on a cumulative-case Bayesian probabilistic argument, see RICHARD SWINBURNE, THE EXISTENCE OF GOD (2d ed. 2004). *See also* WILLIAM LANE CRAIG & QUENTIN SMITH, THEISM, ATHEISM, AND BIG BANG COSMOLOGY (1993).

Wolterstorff is entitled to rely on an intellectual division of labor in this respect.[9] It is also open to anyone to reject any one or more, if not all, of Wolterstorff's theistic premises.[10] For all such critics, Wolterstorff's argument cannot get off the ground. Wolterstorff has in this sense given the contemporary secularist no compelling reason to accept the idea of equal and universal human rights.

Of course, even an argument as thoughtful as Wolterstorff's will inevitably be subject to internal critique as well. Perhaps the most important such internal critique is suggested by Wolterstorff's own teddy bear case. Simply put, we may wrong the child if we callously discard the raggedy bear. But we clearly do not thereby also wrong the bear itself. Now, human beings generally seem much more susceptible of being wronged than do teddy bears. On Wolterstorff's account, we can fathom why seriously wronging a human being could count as a serious wrong against God. But it remains unclear why, on Wolterstorff's account, the wrong accrues not only against God, but also against the human being upon whom worth has been bestowed, and in the specific form of a human rights violation.[11]

II. MACINTYRE'S OCCLUDED THEISM

Alasdair MacIntyre's most recent contributions to ethical theory[12] are widely known and respected. To the book under review,[13] MacIntyre has contributed a fifty-two-page chapter entitled "Intractable Moral Disagreements,"[14] as well as

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9. It is also possible that if someone found Wolterstorff's account of human rights to otherwise be the best or even the only convincing account, that judgment could perhaps count as an argument, of some weight, backwards, in favor of Wolterstorff's theistic premises. *See* Wolterstorff, *Justice As Inherent Rights*, *supra* note 3, at 272.

10. See, for example, the discussion of Richard Rorty's non-metaphysical pragmatism in Timothy P. Jackson, *The Theory and Practice of Discomfort: Richard Rorty and Pragmatism*, 51 THOMIST 270 (1987) and Bernstein, *supra* note 3, at 231-33. For one very specific question, we might, assuming God's existence, ask how we could reasonably determine whether God's love in history is equal for all persons and groups.

11. For discussion, see Weithman, *supra* note 3. For Wolterstorff's response to Weithman, see Wolterstorff, *Justice as Inherent Rights*, *supra* note 3, at 274-75 (arguing that "[b]estowed honor is a form of worth").

12. *See, e.g.*, ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMANS BEINGS NEED THE VIRTUES (1999); ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION (1990); ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988), and classically, ALASDAIR MACINTYRE, AFTER VIRTUE (3d ed. 2007) (1981). Critically, see the edited collections ALASDAIR MACINTYRE (Mark C. Murphy ed., 2003); AFTER MACINTYRE: CRITICAL PERSPECTIVES ON THE WORK OF ALASDAIR MACINTYRE (John Horton & Susan Mendus eds., 1994).

13. INTRACTABLE DISPUTES ABOUT THE NATURAL LAW: ALASTAIR MACINTYRE AND CRITICS (Lawrence S. Cunningham ed., Univ. of Notre Dame Press 2009) [hereinafter INTRACTABLE DISPUTES].

14. Alasdair MacIntyre, *Intractable Moral Disagreements*, *in* INTRACTABLE DISPUTES, *supra*

a twenty-page response to several accompanying critiques.[15]

Among what persons commonly disagree over are the very existence, substance, and enforcement of human rights.[16] To what extent are such disagreements subject to consensual rational resolution? In answering this question, MacIntyre draws upon his own prior work in the Aristotelian-Thomistic natural law tradition,[17] along with elements of the communicative ethics of Jurgen Habermas.[18] MacIntyre seeks to show both the power and the limitations of his own approach to human rights.

MacIntyre, unlike Wolterstorff, seeks to avoid any appeal to theistic premises, as opposed to more generally accessible insights of reason.[19] His argument, however, implicitly relies on theistic ideas for support. In the end his argument would in a sense be strengthened on its own terms, while being rendered much more controversial, by acknowledging his need for specifically theistic premises. There seems no escape from this dilemma in practical persuasion.

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note 13, at 1.

15. Alasdair MacIntyre, *From Answers to Questions: A Response to the Responses*, *in* INTRACTABLE MORAL DISPUTES, *supra* note 13, at 313.

16. *See* Jean Porter, *Does the Natural Law Provide a Universally Valid Morality?*, *in* INTRACTABLE DISPUTES, *supra* note 13, at 53.

17. Among the most noteworthy recent treatments of natural law theory, any of which cites earlier work, see, for example, AQUINAS'S SUMMA THEOLOGIAE: CRITICAL ESSAYS (Brian Davies ed., 2006); REBECCA KONYNDYK DEYOUNG ET AL., AQUINAS'S ETHICS: METAPHYSICAL FOUNDATIONS, MORAL THEORY, AND THEOLOGICAL CONTEXT: RECLAIMING THE TRADITION FOR CHRISTIAN ETHICS (2009); THE ETHICS OF AQUINAS (Stephen J. Pope ed., 2002); JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY (1998); PAMELA M. HALL, NARRATIVE AND THE NATURAL LAW: AN INTERPRETATION OF THOMISTIC ETHICS (1994); MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS (2006); NATURAL LAW AND MODERN MORAL PHILOSOPHY (Ellen Frankel Paul et al., eds. 2001); NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George ed., 1992); JEAN PORTER, NATURAL & DIVINE LAW: RECLAIMING THE TRADITION FOR CHRISTIAN ETHICS (1999); JEAN PORTER, NATURE AS REASON (2005): ELEONORE STUMP, AQUINAS (2003).

18. *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., MIT Press 1996); JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990); JÜRGEN HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., Beacon Press 1984); *see also* JÜRGEN HABERMAS, BETWEEN NATURALISM AND RELIGION (Ciaran Cronin ed., Polity Press 2008); THE COMMUNICATIVE ETHICS CONTROVERSY (Seyla Benhabib & Fred Dallmayr, eds. 1990). For a specific application, see R. George Wright, *Traces of Violence: Gadamer, Habermas, and the Hate Speech Problem*, 76 CHI.-KENT L. REV. 991 (2000).

19. In seeking to develop a largely Thomistically-inspired natural law theory that purports to not depend upon theistic premises, MacIntyre implicitly follows the example of JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980). Finnis' argument would also require accepting theistic premises to achieve plausibility on its own terms. But of course, adding in specifically theistic premises reduces the appeal of the entire argument for many persons.

At a general level, MacIntyre contends that arguments for or against human rights can gain some real purchase even across different traditions of thought. One tradition may be better able than the other to predict, explain, and resolve problems and breakdowns internal to the other tradition, as perhaps both traditions self-critically evolve.[20] But on the other hand, and by way of limitation, there may be insufficient shared premises and common ground for even a rationally superior tradition to inescapably rationally defeat the arguments of its opponents.[21]

MacIntyre's own particular argument is that as social beings, we require universally free, open, unthreatening, and unconstrained social deliberation over the truth of the best means to promote our visions of the ultimate human good and of the proper roles of other human goods. Our collective deliberation over time must, by its nature, aim at achieving insights into truth, rather than merely expressing preexisting inequalities of power, uncritical self-interest, irrationality, or any threat to coerce any participant.[22]

These conditions for the social deliberative pursuit of truth are said to be "universal," "exceptionless," and "presupposed" as "principles [of] practical reasoning," rather than drawn as conclusions at the end of our practical reasoning.[23] But crucially, according to MacIntyre, in recognizing these qualities of shared practical deliberation, we have already thereby accepted (identical) principles of Thomistic natural law, and have also come some distance in understanding how the natural law requires that a just political society itself be structured.[24]

We can, however, imagine a cogent response to MacIntyre from, say, the utilitarian tradition. There are many possible forms of utilitarianism, with none evidently purer than many others.[25] A utilitarian, intent on somehow maximizing utility, in some sense, over some time frame, certainly need not feel bound by MacIntyre's argument generally, or for human rights in particular.[26] Utilitarians may, or may not, accept any universal rules of the sort endorsed by MacIntyre. A utilitarian might under certain conditions for the sake of utility exclude certain persons from the deliberative process, or constrain their participation in certain respects.[27]

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20. *See* MacIntyre, *Intractable Moral Disagreements*, *in* INTRACTABLE DISPUTES, *supra* note 13, at 4, 33.

21. *See id.* at 4, 32.

22. *See id.* at 20-23.

23. *See id.* at 24.

24. *See id.* at 23.

25. See the very useful distinctions articulated in David Lyons, *The Moral Opacity of Utilitarianism*, *in* MORALITY, RULES, AND CONSEQUENCES: A CRITICAL READER 105 (Brad Hooker et al. eds., 2000).

26. *See* MacIntyre, *Intractable Moral Disagreements*, *in* INTRACTABLE DISPUTES, *supra* note 13, at 31.

27. It is probably fair to include even J.S. Mill within this category, in several respects. *See* JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed., Penguin Books 1985) (1859). For

Utilitarian departures from MacIntyre's exceptionless rules might, contrary to MacIntyre's own system, be based not on any a priori principle, but on accumulated experience. Perhaps the utilitarian would conclude that limiting the universality of the pursuit of truth in some contexts actually speeds the discovery or dissemination of truth. Or we might conclude that limiting the deliberative participation of, say, Holocaust deniers pays for itself in other values, even apart from truth.[28]

In any event, we, along with the utilitarians, could easily envision reasonable departures from the universalist procedures and human rights positions adopted by MacIntyre. Truth is not something that is simply pursued maximally, whatever the costs, or else held in contempt. Truth can rationally be pursued and disseminated at various rates over time, in light of inescapable tradeoffs among whatever contributes to truth-seeking, or tradeoffs with other values.

It would certainly be possible for MacIntyre to, in a sense, strengthen his human rights and other natural law arguments with helpful theistic premises. MacIntyre might then argue, for example, that divine providence serves to infallibly guarantee that lying to a person, or that intentionally and directly limiting that person's deliberative participation, can, over the course of eternity, never pay off in terms of utility, or any other value. But such a theistic buttressing—or grounding—would of course only invite objection and dissent on any number of reasonable grounds.[29]

III. PERRY'S CHALLENGE TO PURELY SECULAR HUMAN RIGHTS THEORY

Michael J. Perry's work on human rights is a remarkably sophisticated treatment of an unusually broad range of systematically related questions. It ranges from metaethics to subtle issues of legislative and judicial recognition and enforcement, domestically and internationally, typically presented in the context of controversial substantive human rights issues.[30] Our focus, however, will be on Perry's narrower critique of some prominent secular, or presumably secular, accounts of human rights.

Perry's own positive doctrine of the foundation of human rights is theistically based. The basic human rights claim is that "every human being has inherent

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discussion of the limitations of typical utilitarian theory as a human rights theory, see, for example, JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 92-93 (1987).

28. *See generally* R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527 (2006).

29. We saw this more directly and explicitly in the context of Nicholas Wolterstorff's argument, *supra* Part I. For a broader critique of MacIntyre's argument, see Porter, *Does the Natural Law Provide a Universally Valid Morality?*, *in* INTRACTABLE DISPUTES, *supra* note 13, at 74-75, 81, 90-91.

30. In addition to the present volume, see, for example, MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 11-41 (1998), as well as MICHAEL J. PERRY, THE POLITICAL MORALITY OF LIBERAL DEMOCRACY ch. 1 (Cambridge Univ. Press 2009).

dignity and is inviolable."[31] The ground for this assertion reflects God's nature, our own nature, the world, and the relationships between ourselves and God. In particular, we "are the beloved children of God" and thus, at least analogically, universally "sisters and brothers to one another."[32] In loving one another, and by implication respecting one another's human rights, we also contribute to our ultimate flourishing and fulfillment,[33] though we are not aiming at our own flourishing as a goal in doing so.[34] Perry's theistic argument is logically separate from any possible claims that religious motivation itself commonly inspires human rights violations, that religious non-believers can consistently respect human rights, and that there can be all sorts of non-theistic reasons, including sheer self-interest, to support the idea of human rights.[35]

Perry's argument against the viability of purely secular human rights theories does not take the form of a universal impossibility theorem, as in the work of Kurt Gödel,[36] or Kenneth Arrow.[37] Perry instead inductively examines some of the leading candidates for a secular theory of human rights. Among these are the widely recognized works of John Finnis,[38] Ronald Dworkin,[39] Martha Nussbaum,[40] contemporary evolutionary biologists,[41] and in a rather more

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31. PERRY, *supra* note 1, at 6.

32. *See id.* at 8.

33. *See id.* at 9. More starkly, see HANS URS VON BALTHASAR, LOVE ALONE IS CREDIBLE 101 (D.C. Schindler trans., Ignatius Press 2004) (1963) ("Love alone is credible; nothing else can be believed, and nothing else ought to be believed . . . .").

34. *See* PERRY, *supra* note 1, at 11.

35. This is distinct from offering any stable and viable justification and motivation for human rights themselves. It does seem entirely possible, though, for the identification and specification of particular human rights to draw upon secular considerations, including secular versions of ideas such as love, dignity, respect, and equality, as long as those results are compatible with any theistic conceptions necessary for their deeper justification. This issue is raised in Mark Modak-Truran, Book Review, 88 J. RELIGION 257, 258 (2008).

36. *See, e.g.*, DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID (20th Anniversary ed. 1999).

37. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed., Yale Univ. Press 1970).

38. *See* FINNIS, *supra* note 19. For discussion of traditional natural law theory as ultimately dependent upon theistic premises, as opposed to merely an autonomous secular reason, see, for example, Russell Hittinger, *Natural Law as "Law": Reflections on the Occasion of "Veritatis Splendor,"* 39 AM. J. JURIS. 1, 11-16 (1994).

39. *See* PERRY, *supra* note 1, at 20-21; *see also* RONALD M. DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010).

40. *See* PERRY, *supra* note 1, at 22-23.

41. *See id.* at 23-25. Perhaps the single most useful source, incorporating a range of sophisticated perspectives, is EVOLUTION AND ETHICS: HUMAN MORALITY IN BIOLOGICAL AND RELIGIOUS PERSPECTIVE (Philip Clayton & Jeffrey Schloss eds., 2004). *See also* RICHARD JOYCE, THE EVOLUTION OF MORALITY (2006); ANTHONY O'HEAR, BEYOND EVOLUTION: HUMAN NATURE AND THE LIMITS OF EVOLUTIONARY EXPLANATION (1997); HOLMES ROLSTON, III, GENES, GENESIS

skeptical vein, the pragmatist Richard Rorty.[42]

Even the most skeptical theorist—perhaps a pure materialist, who denies irreducible human consciousness, genuine freedom, and personhood in the traditional sense—can still appropriate the language of human rights, and endorse human rights on the basis of a broad, mysterious intuition.[43] But any secular theory of human rights must also justify the universal reach and equality of human rights, in the face of obvious inequalities among genetic human beings. And the secular human rights theorist, including the secular evolutionary biologist, must finally account reasonably for the substantial and perhaps unrecognized sacrifices we might owe, individually or as a group, to distant genetic strangers who can provide no reciprocity or recompense to anyone.

It can sometimes be personally or professionally beneficial for us to endorse verbally a moral position that, if actually implemented as policy, would call for our own substantial sacrifice, or that might be arbitrary or deeply incoherent.[44] At some point, though, the secular human rights theorist must explain how a potentially demanding theory of human rights[45] could over the long run, widely motivate, substantial and perhaps unrecognized sacrifices of individual or group interest for the sake of genetic strangers who cannot possibly repay us, directly or indirectly.

AND GOD (1999); PETER SINGER, A DARWINIAN LEFT: POLITICS, EVOLUTION AND COOPERATION (1999). For a skeptical reference, see MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 79 (Amy Gutmann ed., 2001) (suggesting some realistic limits to genetic altruism).

42. *See* PERRY, *supra* note 1, at 26-29; *see also* Jackson, *supra* note 10. For broader discussion of Rorty, see, for example, ALAN MALACHOWSKI, RICHARD RORTY (2002); RICHARD RORTY (Charles Guignon & David R. Hiley eds., 2003); RORTY AND HIS CRITICS (Robert B. Brandom ed., 2000). *See also* SUSAN NEIMAN, MORAL CLARITY: A GUIDE FOR GROWN-UP IDEALISTS 88-89 (rev. ed., Princeton Univ. Press 2009) (arguing that "in many fields—like the law . . . the metaphysical questions Rorty dismissed are of great concern. For habits are just habits, and those that require any effort tend to succumb to inertia in the absence of principle").

43. For a sophisticated version of contemporary intuitionism, see MICHAEL HUEMER, ETHICAL INTUITIONISM (2005). *See also* ROBERT AUDI, THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE (2005); ETHICAL INTUITIONISM: RE-EVALUATIONS (Philip Stratton-Lake ed., 2003). For a brief argument that human rights are, and should be thought of as, indemonstrably self-evident, see Amitai Etzioni, *The Normativity of Human Rights Is Self-Evident*, 32 HUM. RTS. Q. 187 (2010).

44. *See* Michael Huemer, *Why People Are Irrational About Politics*, http://home.sprynet.com/~owl1/irrationality.htm (last visited Sept. 30, 2009).

45. See, for example, the classic early discussion by Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972), and PETER UNGER, LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE 134 (1996). From religious perspectives, for example, GARTH L. HALLETT, CHRISTIAN NEIGHBOR-LOVE: AN ASSESSMENT OF SIX RIVAL VERSIONS 3-6 (1989); TIMOTHY P. JACKSON, THE PRIORITY OF LOVE: CHRISTIAN CHARITY AND SOCIAL JUSTICE 10 (2003). For a religious response to the gulf between a broad and generous conception of human rights and the limits of stable, long-term sacrificial human motivation, see JOHN E. HARE, THE MORAL GAP: KANTIAN ETHICS, HUMAN LIMITS, AND GOD'S ASSISTANCE 1 (1996).

The ultimate problem is that what is advertised as a secular human rights theory may turn out to be dependent—"parasitic" would be the more pejorative term—on a gradually abandoned theistic culture, however much theism may itself be responsible for human rights violations. The concern is for the long-term, overall motivational effects of what we might call a "deracination," in which the idea of human rights is uprooted from its nourishing soil, and carefully placed in the lapel of civilization's evening jacket.[46] Professor Perry rightly leaves this ultimate concern as an open question.[47]

IV. GRIFFIN'S SEARCH FOR HUMAN RIGHTS DETERMINACY

James Griffin argues that "[w]hen during the seventeenth and eighteenth centuries the theological content of the idea [of human rights] was abandoned, nothing was put in its place," leaving us with only "indeterminate" references to "human right."[48] Griffin's own proposal seeks what is called a constructivist, or a coherentist as distinct from a rigorously foundationalist,[49] justification for human rights.[50] Denying that there is a "sharp" distinction here between "fact and value,"[51] Griffin argues that we have a basic interest—our lives generally go better—in the promotion of our personhood or our rational capacity for "normative agency."[52] Normative agency is in turn the "capacity to choose and

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46. It is certainly possible to argue that well-meaning persons of any sort, even fifty years from now, will retain a certain basic empathy for the elemental sufferings of others, even distant strangers. Let us hope so, but let us also hope that progress in pharmacology over the next fifty years does not dull the edge of empathy through pharmaceuticals for either the worst-off or, more likely, for potential sacrificers.

47. *See* PERRY, *supra* note 1, at 29. For further discussion, see DOES HUMAN RIGHTS NEED GOD? (Elizabeth M. Bucar & Barbra Barnett eds., 2005).

48. JAMES GRIFFIN, ON HUMAN RIGHTS 2, 15-18 (Oxford Univ. Press 2008) [hereinafter GRIFFIN, ON HUMAN RIGHTS]. For an authoritative view, see James Griffin, Remarks at the Book Launch (Jan. 23, 2008), *available at* http://ethics-etc.com/wp-content/uploads/2008/02/griffin.pdf (last visited Sept. 25, 2009). *See also* William J. Talbott, Book Review, NOTRE DAME PHIL. REV. (2008), *available at* http://ndpr.nd.edu/review. cfm?id=14645; Rowan Cruft, *Two Approaches to Human Rights*, 60 PHIL. Q. 176 (2010).

49. For this distinction in a legal context, see R. George Wright, *Two Models of Constitutional Adjudication*, 40 AM. U. L. REV. 1357 (1991). Of course, different networks of theory may turn out to be equally coherent, or we may find the question of which network of theory is more internally coherent to be unanswerable in any neutral way. For a brief version of a well-known foundationalist approach to human rights, see Alan Gewirth, *The Basis and Content of Human Rights*, *in* 23 NOMOS: HUMAN RIGHTS 119 (J. Roland Pennock & John W. Chapman eds. 1981). For critique, see, for example, Richard B. Friedman, *The Basis of Human Rights: A Criticism of Gewirth's Theory*, *in* 23 NOMAS: HUMAN RIGHTS, *supra*, at 148.

50. *See* GRIFFIN, ON HUMAN RIGHTS, *supra* note 48, at 4.

51. *See id.* at 123.

52. *See id.* at 149.

. . . pursue our conception of a worthwhile life."[53] This capacity comprises autonomous choice, free action on one's choices, and the social and economic means necessary for one's autonomy and freedom.[54] In addition, though, Griffin emphasizes that human rights theory must take proper account of the nature and limitations of human beings and their circumstances, or what Griffin calls "practicalities."[55]

The problem here is that Griffin's attempt to rely largely upon our best more general ethical theory[56] ensures either the indeterminacy or, for many persons, the arbitrariness of his theory. Griffin's reliance on the rational capacity for normative agency in choosing and pursuing our understanding of a worthwhile life would seem, for example, to rule out any human rights for kindergarten students. There are of course, as Griffin recognizes, moral reasons not to painlessly kill kindergarteners. But the idea of some human rights for kindergarteners really does not seem to be an undue expansion of the core idea of human rights.

Or we could instead think of an adult who has the capacity for rationally formulating and pursuing a conception of the good life, but who has never actually done so. Suppose a government violates that adult's human rights in some way that predictably and perhaps intentionally motivates the adult to, for the first time, actually formulate and pursue a plan of life—perhaps campaigning against human rights violations. In such a case, a human rights violation perhaps intentionally promotes the realization of what was once a mere unused capacity for normative agency.

More fundamentally, the basic relationship between matters of fact and matters of value is not just a matter of overlap, as in Griffin's theory, but remains broadly controversial.[57] It is thus hardly surprising, overall, that Griffin must end, as well as begin, with a substantial and disturbing realm of indeterminacy.[58]

V. COHEN ON THE INDEPENDENCE OF ULTIMATE PRINCIPLES FROM FACTS

The late G.A. Cohen's emphasis is partly on the manipulability and the limited scope, within each society and beyond each individual society, of John

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53. *Id.* at 45.

54. *See id.* at 149.

55. *See id.* at 37-39, 44.

56. *See id.* at 4.

57. *See, e.g.*, THE IS/OUGHT QUESTION: A COLLECTION OF PAPERS ON THE CENTRAL PROBLEM IN MORAL PHILOSOPHY (W.D. Hudson ed., 1969); W.D. Falk, *Hume on Is and Ought*, 6 CAN. J. PHIL. 359 (1976). Reference to "thick" concepts such as interests or pain does not resolve the relevant debates. *See also* G.A. COHEN, RESCUING JUSTICE AND EQUALITY 248-50 (Harvard Univ. Press 2008).

58. *See* GRIFFIN, ON HUMAN RIGHTS, *supra* note 48, at 128 ("[A]t a fairly early point in assessing policies such as 'Don't deliberately kill the innocent[,]' we reach a point where we can no longer tell that one policy is better than another.").

Rawls's famous "difference principle."[59] Cohen's "luck egalitarianism" challenges what is sometimes thought of a natural, unproblematic, or deserved inegalitarian distribution of crucial economic assets, including one's scarce talents, that can be manipulated for selfish economic advantage.[60]

Cohen's interests, however, are broad, and subtly articulated.[61] Our focus herein is on merely one claim that is fundamental to moral theory in general and human rights theory in particular. Specifically, Cohen argues that the most basic normative or moral principles cannot be justified by an appeal to any ordinary facts or circumstances, even on a broad understanding of what counts as "facts."[62] We consider this issue not in order to try to resolve it, but to again illustrate the increasing range of uncertainties underlying the very idea of human rights.

In this respect, Cohen asks us to start with any principle we might choose that is thought to be justified only when certain facts or circumstances hold, but not otherwise. But we can then ask why this is so. Some further principle must be invoked to explain why the earlier principle is justified only under certain factual circumstances. And the second, explanatory principle may admittedly also be based in part on certain facts. But eventually, Cohen thinks, our line of justification must reach some ultimate normative principle that is independent of and does not rely for its justification on any non-normative facts.[63]

Cohen recognizes that many of us think that even the most general human rights principles must in some way reflect or be sensitive to some basic facts.[64] This is certainly not to accept the factual status quo, entrenched power relationships, or privileges that may be widely taken for granted. Instead Cohen argues that "a principle can reflect or respond to a fact only because it is also a

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59. Rawls' difference principle, a secondary element of his theory of justice, requires, at the level of the "basic structure" of society, that inequalities in basic goods including income be arranged so that any inequalities maximize the absolute stock of such goods available to the worst-off persons in that society. *See* JOHN RAWLS, A THEORY OF JUSTICE 76 (1971). For an earlier critique of the difference principle as variously insufficiently-egalitarian, see R. George Wright, *The High Cost of Rawls' Inegalitarianism*, 30 W. POL. Q. 73 (1977). *See also* JOHN RAWLS, THE LAW OF PEOPLES 116, 158-59 (1999).

60. *See* COHEN, *supra* note 57, at 7-8. For discussion, see, for example, Kok-Chor Tan, *A Defense of Luck Egalitarianism*, 105 J. PHIL. 665 (2008), as well as the contributions of Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989) and Richard J. Arneson, *Justice Is Not Equality*, *in* JUSTICE, EQUALITY AND CONSTRUCTIVISM: ESSAYS ON G.A. COHEN'S *RESCUING JUSTICE AND EQUALITY* 5 (Brian Feltham ed., 2009).

61. See, for example, the particular reflections in G.A. COHEN, IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH? 120 (2000).

62. *See* COHEN, *supra* note 57, at 229-73; Thomas Pogge, *Cohen to the Rescue!*, *in* JUSTICE, EQUALITY AND CONSTRUCTIVISM, *supra* note 60, at 88-109; *see also* Jon Mandle, Book Review, NOTRE DAME PHIL. REV. *available at* http://ndpr.nd.edu/review.cfm?id=16945; Ingrid Robeyns, *Review*, 120 ETHICS 156 (2009).

63. *See* COHEN, *supra* note 57, at 232, 237, 291; Pogge, *supra* note 62, at 103.

64. *See* COHEN, *supra* note 57, at 231.

response to a [further or deeper] principle that is not a response to a fact."[65]

This does not seem to be true of all principles outside of morality and human rights. Suppose we keep pressing someone as to why they are mowing someone else's lawn. They respond that money is involved, and then the consumption of ice cream, with due concerns for cost and health. Finally we are reduced to asking the person, who as a matter of subjective taste prefers chocolate, why they have on this occasion chosen chocolate. If the person at this stage has not run out of (non-moral) principles, he or she might say that under these (or relevantly similar) circumstances, one can reasonably indulge one's strongest current subjective taste in ice cream.

But even this principle implicitly includes reference to facts and circumstances, including distinguishing flavors, aromas, consistencies, and illustrating that taste can cause pleasure, and in different degrees. One need not, thankfully, rely on some sort of idea of betterness-of-chocolate that holds under all imaginable circumstances.

These relevant facts about persons, tastes, and pleasures could have been different, in which case whatever (non-moral) principles we might have held would likely require modification. And it is hard to see how shifting the focus to human rights principle removes the ultimate dependence of the most basic human rights principles on general facts and circumstances.

Human rights principles, even at some ultimate level, seem to depend for their normative force, and even for their meaning, on various sorts of facts regarding scarcity, limitations of resources, human vulnerabilities and insufficiencies, the need for cooperation and communication for certain tasks, varying levels of human interests and aspirations, and so on. The morality and law of human rights, even at the most basic level, would look different if these basic facts and circumstances were different.

Now, it may be possible to aggregate any of the above basic principles, along with all the relevant facts and circumstances, into one grand—if realistically unusable—principle, and then assert that this inarticulable compound normative principle, incorporating all the relevant facts, is itself not dependent upon any further, yet unassimilated facts. But one would then be left to wonder about the significance, in theory or practice, of the meaningfulness of an inexpressible, pages-long principle.

But if Cohen is even arguably right about an obviously important matter here,[66] we have yet another example of the increasing fragmentation and controversiality of the very idea of human rights.

VI. SANDEL, RESPONSIBILITY, AND THE GHOSTS OF METAPHYSICS

Michael J. Sandel's popular course-based book on justice is already

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65. *Id.* at 232 (emphasis omitted).

66. The relevant idea of sensitivity of a principle to facts may be ambiguous. *See* POGGE, *supra* note 62, at 93.

something of an academic phenomenon, spawning its own website,[67] Facebook page,[68] PBS television series,[69] and a Today show promotion "sandwiched between a cooking demonstration and a segment on a turtle named Lucky."[70] The book's primary emphasis is on substantive or normative ethics,[71] with only modest attention paid explicitly to the theory of human rights, or to metaethical issues in general. We can, however, briefly note Sandel's discussion of utilitarianism, and its implications for human rights, and conclude with a bit of speculation about more metaphysical matters.

It has, of late, been argued that a focus on welfare or utility offers theoretical and practical advantages over a continuing focus on human rights.[72] Sandel points to some standard critical responses to relying on utilitarianism. Only contingency, or chance, links maximizing utility, even over the long run, and the basic rights of innocent victims.[73] However we think of utility or welfare maximization,[74] there can be no guarantee—in the sense that an absolutist[75] human rights norm provides a theoretical guarantee—against any authorized violation of evidently basic rights. In contrast, it is also possible that forms of utilitarianism that do not explicitly refer to human rights might, in practice, wind up protecting human rights more effectively than any explicit regime of human

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67. Harvard University's Justice with Michael Sandel, http://justiceharvard.org/ (last visited Oct. 2, 2009).

68. Readily befriendable under the search query Michael Sandel on Justice.

69. *See* Patricia Cohen, *Morals Class Is Starting: Please Pass the Popcorn*, N.Y. TIMES, Sept. 26, 2009, at C1.

70. *Id.*

71. In general, asking students to evaluate the moral behavior, say of actors in an economic market, before studying the perhaps less superficially interesting theory and operation of regulated and unregulated markets, carries some predictable risks.

72. *See* POSNER, *supra* note 2. For general commentary on utilitarianism with human rights implications, see sources cited *supra* notes 25-27. Classically, see the debate between J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973). While we cannot summarily critique Eric Posner's approach, *supra*, the advantages claimed for focusing on well-being rather than on human rights are unclear. For one thing, the two concepts typically overlap, and human rights still, as of now, carries more evocative and motivational force as rhetoric. There is also likely to be a tradeoff between the verifiability of compliance with welfare norms and the claimed fairness or feasibility of compliance. It is just as easy to blame outsider misconduct and unfairness for internal economic performance as for internal human rights violations. Also, some human rights theories allow for defeasibility and for practicalities and tradeoffs. *See* GRIFFIN, ON HUMAN RIGHTS, *supra* note 48. The popularity of enforceable human rights as well as welfare norms largely depends on the level of generality at which each is formulated. But all of this may be fairly debated.

73. *See* MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 50-51 (2009).

74. *See* Lyons, *supra* note 25.

75. For a debate over moral absolutism, see Patrick Hawley, *Moral Absolutism Defended*, 105 J. PHIL. 273 (2008); Frank Jackson & Michael Smith, *Absolutist Moral Theories and Uncertainty*, 103 J. PHIL. 267 (2006).

rights.[76]

As hazy as these considerations may be, Sandel leaves us with much to think about, little ultimate clarity, in the area of the metaphysics of ethics and of human rights. Consider Sandel's earlier book on ethics and biotechnology.[77] There, Sandel argues that "eugenics and genetic engineering . . . represent the one-sided triumph of willfulness over giftedness, of dominion over reverence, of molding over beholding,"[78] and a loss of "our sense of giftedness[.]"[79] This is a fascinating and academically unusual language. Sandel immediately argues that these concerns need not be accounted for in religious terms;[80] they can apparently have a sufficient, independent, and self-standing "secular" justification as well.[81]

Sandel rightly points out that the loss of a "sense of giftedness"—imagine a future child as a genetically custom-designed consumer product—implicates "humility, responsibility, and solidarity,"[82] and thus potentially the scope and meaning of human rights.[83] For our purposes, we should point out that familiar theories of human rights depend, ultimately, on our beliefs about human responsibility falling within only a narrow "middle" portion of the much broader possible range of beliefs about human responsibility. Persons must bear neither too little, nor too much, responsibility for a viable and full human rights regime. Let us briefly explore this idea.

At both extremes of the idea of responsibility, the logic and motivation of at least some human rights must eventually dissolve. This is true even if we continue to use the same human rights terminology, evacuated of its traditional meaning. If, toward one end of the spectrum, we adopt a materialist view of the world, confined largely to some combination of determinism and randomness, we may continue to use the terminology of responsibility and human rights, but those ideas would eventually become a corsage, rather than a living, rooted plant.[84]

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76. This possibility would mirror the idea that we may not best achieve happiness, or maximize utility, by consciously and explicitly aiming at happiness or a utility maximization.

77. MICHAEL J. SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING (2007) [hereinafter SANDEL, THE CASE AGAINST PERFECTION]; *see also* Michael J. Sandel, *The Case Against Perfection*, ATLANTIC, Apr. 2004, *available at* http://www.theatlantic.com/ doc/200404/sandel.

78. See the book version of SANDEL, THE CASE AGAINST PERFECTION, *supra* note 77, at 85.

79. *Id.*

80. *Id.* at 85-86.

81. *See id.* at 86.

82. *Id.* at 85-86.

83. For some background speculation, see R. George Wright, *Personhood 2.0: Enhanced and Unenhanced Persons and the Equal Protection of the Laws*, 23 QUINNIPIAC L. REV. 1047 (2005).

84. Of course, some persons and groups may continue to have various self-interested reasons for continuing to talk of human rights. For a dramatic formulation of contemporary materialism, consider: "[a] few years ago, Stephen Hawking summed up scientists' prevailing attitude toward the status of life in the universe. 'The human race is just a chemical scum on a moderate-sized planet.'" PAUL DAVIES, COSMIC JACKPOT: WHY OUR UNIVERSE IS JUST RIGHT FOR LIFE 222 (2007)

Too little meaningful responsibility and related ideas, and the meaning and motivational force of human rights must eventually wither.

But consider the other end of the range of possibilities about responsibility. If the scope of the genuine freedom, autonomy, and control[85] of persons really expands beyond a certain point, each of us becomes largely responsible for our own outcomes, given the risks we have genuinely freely chosen to run. Thus, as our personal and group responsibility expands, the logic and motivation for those human rights focused on solidarity, fraternity, and material equality of outcome would tend to dissolve.[86]

What is left unclear is why Sandel would regret the loss of solidarity—the pharmacology of minimizing the pains of empathy should by then be well-developed—if genuine freedom, autonomy, and personal control really do expand along with our personal responsibility. Is Sandel's regret mainly a matter of a fear that we will sometimes mistakenly find personal responsibility where none really exists? Or is this mainly just a matter of empathy, of compassion for human weakness, suffering, or regretted outcomes, however genuinely freely and responsibly bad outcomes were risked? We may certainly share such a response, but compassion for freely and responsibly risked disappointments hardly seems an adequate basis for a responsive human right.

Ultimately, Sandel's thinking, along with that of the preceding authors reviewed, each in their diverse ways, inadvertently illustrates the fragility, fragmentation, and continuing disintegration of the contemporary idea of human rights.

VII. CHARLES R. BEITZ'S PRACTICE-ORIENTED APPROACH TO THE IDEA OF HUMAN RIGHTS

Charles R. Beitz has been reflecting on the theory and practice of human rights for some time.[87] Professor Beitz begins with the observation that the increasing prominence of the idea of human rights has not made "any more clear what kinds of objects human rights are supposed to be."[88] Briefly, Beitz's main thesis is that "human rights" is "not so much an abstract normative idea as an emergent political practice."[89]

(quoting DAVID DEUTSCH, THE FABRIC OF REALITY 177-78 (1997)). For an introduction to some contending views on free will and responsibility, see JOHN MARTIN FISCHER ET AL., FOUR VIEWS ON FREE WILL (2007).

85. No doubt freedom, autonomy, and control could easily be counted as human rights themselves, but it is at best unclear that they exhaust the scope of all recognized human rights.

86. Most clearly, "luck egalitarianism" no longer asks much if the only (bad) luck we encounter is the result of risks we have genuinely freely chosen to run. *See* sources cited *supra* note 60. For some complications, see Wright, *supra* note 83.

87. For one brief prior account, now revised and expanded, see Charles Beitz, *What Human Rights Mean*, 132 DAEDALUS 36 (2003).

88. CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS, at xi (2009).

89. *Id.* at xii.

The gist of his position is that we should look primarily to international practice and to function rather than looking to the broad family of natural rights or natural law theories for basic normative and conceptual guidance.[90] A bit more elaborately, Beitz focuses on the developing, maturing, critiquable, partly controversial global discourse and practice of human rights, with its various actors, levels, stages, and other complications, and with an eye toward the presumably most-persuasive interpretations of those various interests we deem, perhaps from beneficence, to be most valuable and important.[91]

Professor Beitz thus rejects a "foundationalist" approach: "[H]uman rights need not be interpreted as deriving their authority from a single [or plural, actually], more basic value or interest such as those of human dignity, personhood, or membership."[92] Such approaches are said to be inevitably misleading as to the grounds, scope, and implementation of human rights.[93]

One problem with this critical claim is that the vast range and diversity of the evolving natural right and natural law, or other foundationalist approaches to what we now call human rights must almost guarantee for most critiques will be largely true of some such approaches, partly true of others, and almost entirely untrue of yet others. For example, far from deferring to the propertied classes mainstream doctrines from the Middle Ages through Immanuel Kant can be hair-raisingly bold in their direct redistributive and legal implications compared to today's standards.[94]

The continuing role of the broad family of natural right and natural law approaches to human rights is subject to reasonable contest. Certainly, the 1948 Universal Declaration of Human Rights itself makes only briefly stated, unelaborated metaphysical commitments as to the nature of human rights.[95] But this hardly reflects a consensus post-metaphysical turn among the delegates. Rather, the breadth and variety of metaphysical and political commitments among the delegates naturally suggested an attempt to set aside as much as possible the question of the nature and justification of human rights, for the sake of a consensus document.

But this lack of consensus, again, can hardly guarantee that individual and collective human rights actors need not depend today, and in the future, on their residual, or even abandoned, metaphysical commitments. Some sort of metaphysics may be necessary for meaningful normative guidance of the practice

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90. *See id.* at 7-9.

91. *See id.* at 7-12.

92. *Id.* at 128.

93. *See id.* at 51.

94. *See, e.g.*, THOMAS AQUINAS, SUMMA THEOLOGICA II-II, question 66, art. 7, respondio (Fathers of the English Dominican Province trans., 2d rev. ed. 1920) (Kevin Knight online ed. 2008), *available at* http://www.newadvent.org/summa/306607.htm); *see also* ST. BONAVENTURE, *The Life of St. Francis*, *in* THE SOUL'S JOURNEY INTO GOD, THE TREE OF LIFE, THE LIFE OF ST. FRANCIS 177, 254 (Ewert Cousins trans., Paulist Press ed. 1978) (1263); IMMANUEL KANT, EDUCATION § 98, at 105 (Annette Churton trans., Univ. Michigan Press 1964) (1803).

95. *See* BEITZ, *supra* note 88, at 8.

of human rights. In the long run, metaphysics—the deeper "why" questions and their answers—may also be necessary to motivate the sacrifices sometimes called for by human rights, as human rights are commonly understood. In the end, whether which we can develop a worthy and sustainable international and global system of human rights by foregrounding practice and backgrounding, or even setting aside, the broad evolving family of natural rights and natural law theories is yet another unresolved matter of increasing contest and controversy.[96]

96. For a further recent discussion of a more political, as opposed to natural rights-oriented approach to human rights, see Kenneth Baynes, *Toward a Political Conception of Human Rights*, 35 PHIL. & SOC. CRITICISM 371 (2009).

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PANEL DISCUSSION TRANSCRIPT

HONORING THE LEGACIES OF JUSTICE WILLIAM J. BRENNAN, JR., AND JUSTICE THURGOOD MARSHALL

A PANEL DISCUSSION PRESENTED BY THE INDIANAPOLIS LAWYER CHAPTER OF THE AMERICAN CONSTITUTION SOCIETY

GAVIN M. ROSE*
JESS REAGAN**
DINO L. POLLOCK***

PREFACE

When the Honorable Thurgood Marshall was asked in 1987 to reflect on the 200th anniversary of the U.S. Constitution, he did so not with the blind patriotism that might be expected of a man who had spent the greatest portion of his life celebrating the document's intricacies but with a "sensitive understanding of the Constitution's inherent defects."[1] The founders of our nation, after all, penned the most important stanzas of our Constitution in a world in which slavery still existed, one in which it could not have been imagined that a woman would one day sit together with an African American on our highest Bench. The "true miracle" that Justice Marshall saw fit to idolize, "was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our

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1. Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

own making, and a life embodying much good fortune that was not."[2] Two years earlier, the Honorable William Brennan, Jr., had articulated precisely the judicial philosophy that gave birth to Justice Marshall's "miracle": "[T]he genius of the Constitution," said Justice Brennan, "rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[3]

It is this philosophy that has guided progressive thought—both judicial and extra-judicial—through more than half a century, and one that has seen no greater standard-bearers than Justices Brennan and Marshall. The span of thirty-five years from Justice Brennan's confirmation to Justice Marshall's retirement saw nearly unimaginable strides taken in the areas of voting rights,[4] procedural due process,[5] equal protection,[6] free speech,[7] and criminal procedure.[8] This era saw the declaration of the unconstitutionality of a prohibition on the distribution of contraceptives,[9] the recognition of a constitutional right to abortion,[10] and a four-year hiatus on executions in the United States.[11] It saw, above all, a revitalization in the ability of law to mirror social and political progress.

In a partial dissent written well into his tenure on the Court, Justice Marshall (joined, of course, by Justice Brennan) penned words that would encapsulate this dramatic—and unprecedented—expansion of rights. "Courts," he wrote,

> do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an

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2. *Id.*

3. Byron R. White, Tribute, *Tribute to Honorable William J. Brennan, Jr.*, 100 YALE L.J. 1113, 1116 (1991).

4. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

5. *See, e.g.*, Vitek v. Jones, 445 U.S. 480 (1980); Mathews v. Eldridge, 424 U.S. 319 (1976); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

6. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Craig v. Boren, 429 U.S. 190 (1976); Jackson v. Indiana, 406 U.S. 715 (1972); Reed v. Reed, 404 U.S. 71 (1971); Graham v. Richardson, 403 U.S. 365 (1971); Loving v. Virginia, 388 U.S. 1 (1967).

7. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); Dombrowski v. Pfister, 380 U.S. 489 (1965); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Roth v. United States, 354 U.S. 476 (1957).

8. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986); Terry v. Ohio, 392 U.S. 1 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

9. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

10. *See* Roe v. Wade, 410 U.S. 113 (1973).

11. *See* Furman v. Georgia, 408 U.S. 238 (1972).

> artificial and invidious constraint on human potential and freedom. Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests.[12]

Thus, although—in the words of Justice Brennan—the safeguards enshrined in the Bill of Rights "are deeply etched in the foundations of America's freedoms,"[13] these safeguards are rendered altogether meaningless if they are not valued, guarded, and occasionally expanded. Over the course of our nation's history, few have acted as such staunch guardians as have these two giants of U.S. jurisprudence.

On February 23, 2010, the Indianapolis Lawyer Chapter of the American Constitution Society was proud to present a discussion on the legacies of Justices Brennan and Marshall and the future of the Court. We are indebted first and foremost to the Indiana Supreme Court and Chief Justice Randall T. Shepard for graciously opening its doors to this discussion and for playing the role of host. We wish to also express our gratitude to each of the panelists for their insights, their stories, and their overwhelming eagerness to participate in this discussion. We therefore thank each of our outstanding panelists for their invaluable contributions: Justice Theodore R. Boehm; Professor Geoffrey R. Stone; Professor Mark V. Tushnet; and our superb moderator, Professor Rosalie Berger Levinson, who set the table for a robust discussion. Each panelist served with distinction as a law clerk on the U.S. Supreme Court, and we owe them each an additional debt of gratitude for the roles they have played in helping to shape our constitutional jurisprudence. We would also like to thank the Indianapolis law firms of Baker & Daniels LLP and Bose McKinney & Evans LLP for their generous donations in support of this program. Finally, we wish to thank both the Indiana University—Indianapolis Law School Chapter of the American Constitution Society and the *Indiana Law Review*, for assistance in preparing and organizing this discussion and for agreeing to publish its contents, respectively.

Five years before his retirement, Justice Brennan commented that a judge should proceed with "a sparkling vision of the supremacy of the human dignity of every individual,"[14] and it is with respect for this spirit in mind that we hope to do our part to honor the legacies of two of our nation's greatest jurists.

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12. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (internal citations omitted).

13. William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 776 (1961).

14. White, *supra* note 3, at 1116 (citing a 1985 lecture by Justice Brennan at Georgetown University).

PANEL DISCUSSION[15]
Date: February 23, 2010
Location: Courtroom of the Supreme Court of Indiana

PANELISTS:

Professor Rosalie Berger Levinson, Moderator, Phyllis and Richard Duesenberg Professor of Law, Valparaiso University School of Law

Professor Mark V. Tushnet, William Nelson Cromwell Professor of Law, Harvard Law School

Professor Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor, University of Chicago Law School

The Honorable Theodore R. Boehm, Associate Justice, Indiana Supreme Court

PROFESSOR LEVINSON:

There has been much discussion recently about what the role of the Supreme Court should be in interpreting the Constitution. The *Heller* case,[16] which gave new meaning to the Second Amendment right to bear arms, reinvigorated the battle between those who espouse an originalist interpretation with its various permutations—looking to the intent of the Framers of the Constitution, the intent of those who ratified it, or "the public meaning,"—and those who espouse the "living Constitution." Let me quote Justice Brennan's description: "The genius of the Constitution rests not in any static meaning it may have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and present needs."[17]

It is clear that Justice Brennan, as well as Justice Marshall and Justice Warren, endorsed the living Constitution, or what Professor Michael Dorf at Cornell calls "aspirational constitutionalism"[18]—the notion that those who framed the original text understood that the open-ended values set forth in our Constitution would not be realized at the time of its adoption. This would be left to later generations, and the Justices who interpret the document should be guided by this understanding. Indeed, Justice Brennan referred to the Constitution as the "lodestar of our aspirations."[19]

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15. This transcript has been edited for clarity and brevity's sake. The original transcript was transcribed by ClearPoint Legal, Indianapolis, Indiana.

16. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

17. REASON & PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 18 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

18. Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631 (2009).

19. Justice William J. Brennan, Jr., Associate Justice, U.S. Supreme Court, Address to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *available at* http://www.

Justice Marshall shared this aspirational vision. Thurgood Marshall, first as an advocate for twenty-five years for the NAACP and later as a Justice, truly framed the constitutional right to racial equality—a right that most of the Framers likely never envisioned as barring de jure segregation, white primaries, or racially restricted covenants. Of course, advocate Marshall was assisted in achieving the goal of equal educational opportunity by Chief Justice Earl Warren, who penned the famous *Brown v. Board of Education*[20] decision, and later Justice Brennan, whose decisions helped implement the desegregation mandate.

In the same way, Justice Brennan assisted advocate Ruth Bader Ginsburg in framing the constitutional right to gender equality—again, a right that was not envisioned by the Framers, who would have been surprised to know that the Equal Protection Clause prohibited sex bias. Ruth Bader Ginsburg as advocate and Justice Brennan as author of key decisions in the 1970s, were the real framers of the constitutional right to gender equality, just as the true framers of the right to racial equality were Thurgood Marshall, as an advocate and later as Justice, as well as Earl Warren. As Professor Dorf put it, "the success of the civil rights movement in the twentieth century . . . was [really] a jurisgenerative accomplishment."[21] And the Justices we honor today were at the center of that movement.

Justice Marshall served on the Supreme Court from 1967 to 1991, and he began his aspirational work as an advocate back in the 1930s. Justice Brennan served on the Supreme Court for thirty-four years, from 1956 to 1990, a time spanning eight Presidencies. He authored over 1500 decisions. Rather than examining all 1500, I will just focus on some key decisions handed down when our guest speakers were clerking for their justices.

During the 1972–73 Term when Professor Tushnet and Professor Stone served as law clerks, Justice Brennan authored the plurality opinion in *Frontiero v. Richardson*,[22] asserting for the first time that strict scrutiny should be the standard for judging the validity of laws that classified based on gender. He never got the fifth vote for strict scrutiny, but he clearly was instrumental in moving the Court towards recognizing, as Justice Ginsburg put it, that "our living Constitution obligates government to respect women and men as persons of equal stature and dignity."[23]

A second Brennan opinion that Term, perhaps less well known, invalidated an amendment to the Federal Food Stamp Program, which denied benefits to households with unrelated occupants.[24] Congress wanted to ensure that hippie communes would not receive food stamps.[25] Justice Brennan announced the core

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teachingamericanhistory.org/library/index.asp?document=2342.

20. 347 U.S. 483 (1954).

21. Dorf, *supra* note 18, at 1648.

22. 411 U.S. 677 (1973) (plurality opinion).

23. Ruth Bader Ginsburg, *Closing Remarks for Symposium on "Justice Brennan and the Living Constitution,"* 95 CAL. L. REV. 2217, 2219 (2007).

24. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

25. *Id.* at 534.

principle that the Equal Protection Clause must mean, at minimum, that, "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[26] It was this language that was invoked thirty years later by Justice Kennedy to strike down the Texas sodomy law.[27]

During this same eventful Term, the Supreme Court handed down the extremely controversial decision in *Roe v. Wade*[28] on abortion, and in *San Antonio Independent School District v. Rodriguez*,[29] it sustained local property taxes as a means to finance public education, despite the gross disparities in educational opportunity that this produced—triggering a vigorous and poignant dissent by Justice Marshall.[30]

Finally, when Theodore Boehm was clerking for Chief Justice Warren during the 1963-64 Term, the Chief Justice authored the opinion in *New York Times Co. v. Sullivan*,[31] providing significant protection for the press from libel actions brought by government officials, and *Reynolds v. Sims*,[32] declaring the "one person, one vote"[33] principle, which completely altered the face of democracy in this country.

Obviously, we have much to discuss this afternoon. I want to begin by briefly introducing our three extraordinarily accomplished panelists.

To my far left, Justice Theodore Boehm,[34] who has served on the Indiana Supreme Court since 1996. He graduated magna cum laude from Harvard, where he served as an editor of the *Harvard Law Review*, and then assumed the position as law clerk to Chief Justice Earl Warren during the 1963 Term. After that, he worked for Baker & Daniels, becoming a partner in 1970 and managing partner in 1980. He worked also for General Electric and the Eli Lilly Company. Today, he serves on numerous boards and commissions. And, Justice, we are very fortunate to have you as a member of our Supreme Court.

Geoffrey Stone[35] has been a member of the University of Chicago Law School's faculty since 1973. He served both as Dean of the Law School and Provost of the University of Chicago. After law school, he clerked for Judge Skelly Wright of the District of Columbia Court of Appeals before assuming his position with Justice Brennan. He has written numerous books and articles in the area of constitutional law, and has received several national book awards. In 2006, he helped organize and participate in a symposium honoring the legacy of

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26. *Id.*

27. Lawrence v. Texas, 539 U.S. 558, 582 (2003) (quoting *Moreno*, 413 U.S. at 534).

28. 410 U.S. 113 (1973).

29. 411 U.S. 1 (1973).

30. *Id.* at 70 (Marshall, J., dissenting).

31. 376 U.S. 254 (1964).

32. 377 U.S. 533 (1964).

33. *Id.* at 587 (Clark., J., concurring) (citing Gray v. Sanders, 312 U.S. 368, 381 (1963)).

34. Indiana Supreme Court Justice Biographies: Justice Theodore R. Boehm, http://www.in.gov/judiciary/suupreme/bios/boehm.html (last visited Mar. 11, 2010).

35. Geoffrey R. Stone/University of Chicago Law School, http://www.law.uchicago.edu/faculty/stone-g/ (last visited Mar. 11, 2010).

Justice Brennan, sponsored by the Brennan Center for Justice, an organization founded by former law clerks to continue the wonderful work of the Justice. Among Professor Stone's many public activities, he is a member of the National Board of Directors of the American Constitution Society, our host, as well as a member of the National Advisory Council of the ACLU.

Mark Tushnet has been a law professor at Harvard Law School since 2006, following lengthy stints at the University of Wisconsin Law School and at Georgetown, where he served as Associate Dean. He clerked for Thurgood Marshall during the 1972 Term, while Professor Stone clerked for Justice Brennan. The two professors also co-author, with a few others, one of the leading constitutional law textbooks.[36] Professor Tushnet specializes in constitutional law and theory. He has written extensively regarding the practice of judicial review, both in this country and around the world. He has authored numerous articles and books on constitutional law, constitutional history and judicial review, and has won several book awards. One of these books, *Making Civil Rights Law*,[37] traces the life of Thurgood Marshall and his work before the Supreme Court from 1936 to 1961.

In short, our panelists are eminently qualified to speak on today's topic. We will begin by giving each a few minutes to make an "opening statement" about their Justice.

PROFESSOR TUSHNET:

Thank you.

I'm happy to be here and really glad that the ACS lawyer chapter here is sponsoring this event. Justice Marshall was a great storyteller. I'm not such a good storyteller, but I am going to try to tell four stories about Justice Marshall, or stories that he told. Justice Marshall's stories always had a point, and I've chosen stories that I think also have a point.

The stories all deal with Marshall when he was a lawyer. The first is this: He regularly took the subway from his office in midtown Manhattan to his apartment at the best address in Harlem. He would get out of the subway and walk along the street, greeted by the gamblers on the corner and the various, as he would put it, "low-lifes," who would joke with him by asking, "What have you done for us today, Lawyer Marshall." He would talk with them, and then he would go to his apartment and entertain Duke Ellington and the other members of the Harlem elite in the evening.

The second story is about Marshall taking an application for a stay of execution in a capital case to Fred Vinson's house, and knocking on the door. Vinson comes out with his sandals on and shuffles out and invites Marshall in after Marshall says why he's there. Marshall looks around and notices he's interrupted Vinson's poker game with Harry Truman and a couple other members of the administration. And Vinson says, "Sit down, why don't you have a drink with us?"

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36. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (15th ed. 2005).

37. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-1961 (1994).

The third story is a story Marshall told about a young lawyer—it's not clear to me that it was him, although he may have wanted to convey that sense—who was participating in the defense of an African American charged with murder in the South. The case wraps up, and the jury is sent out to deliberate. And this young, inexperienced lawyer asks the court clerk, "How long do you think it's going to take them to render a verdict?" And the court clerk says, "Twelve minutes." And the young lawyer says, "Twelve minutes? It's a very complicated case. It's a capital case. How can it take only twelve minutes?" The clerk says, "Twelve minutes from now." And the lawyer says, "Okay," and goes back and sits down. And exactly twelve minutes from that time, the jury comes back in and renders a verdict of guilty. Afterward the lawyer asked the clerk, "How did you know?" And the clerk says, "That's how long it takes to smoke a cigar."

The fourth story is my favorite. It's about a talk that Marshall gave at a tribute to a civil rights lawyer in Philadelphia named Raymond Pace Alexander.[38] The structure of the talk is this: He starts out as speakers do with some joking remarks, "I'm really happy to be here to be able to honor Raymond Pace Alexander, even though I had to leave the warm climate in Florida to come up here to wintery Philadelphia, where it's really cold and unpleasant." He goes on to talk about Alexander's civil rights practice, how important the work that Alexander has been doing is, and he ends with an explanation of why he had been in Florida in the warm climate. The reason was that he was investigating the assassination of an NAACP leader named Harry Moore, who had been leading a voter registration campaign in Florida. So, the joke that he starts out with turns out to have some very serious background.

Those are the four stories. Now, Justice Marshall actually never would tell you the point of his stories. You were supposed to figure them out yourself. I'm going to tell you the point of these stories.

Last summer, we heard a lot about the appropriateness of the judicial capacity for empathy. What these stories are about is the way a person like Justice Marshall developed empathy across an enormous range of human experience. One of the parts of the conversation last summer suggested that somehow the notion of empathy was limiting. But Marshall's empathy was expansive. Because he could joke with the gamblers and low-lifes in Harlem and then entertain Duke Ellington, because he had defended capital defendants, and sit down and have a drink with Fred Vinson. Because he knew about the assassination of Harry Moore, he could understand why people in Philadelphia needed to care about civil rights.

Judge Jerome Frank in the 1930s wrote a book in which he described Oliver Wendell Holmes as the completely adult judge.[39] I don't know whether that's true of Holmes, but I'm pretty confident that it was true of Justice Marshall. He was a person who knew who he was, knew what he believed, and was not uncomfortable with any of those things. He was, as we would now say,

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38. The text of the talk can be found in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 138-44 (Mark V. Tushnet ed., 2001).

39. JEROME FRANK, LAW AND THE MODERN MIND 253 (4th ed. 1935).

comfortable in his skin. But, there's a line that he would use about that skin. He would say, whenever he woke up, wherever he was in this country, he never had to look in the mirror to know what race he was. Being adult meant understanding what it was to be a black man in America, and what it was to be a white person in America, as well.

PROFESSOR STONE:

Justice Brennan was a remarkable person. Part of what made him so extraordinary was that he was filled with joy. He always had a sparkle in his eye, a kind word, and a hand on your arm when he spoke with you. He looked you squarely in the eye, was always sympathetic and supportive, and almost always generous in his evaluations of others. The three exceptions I can recall were Joseph McCarthy, Richard Nixon, and Warren Burger. Other than those three, he was always extremely generous in spirit.

Brennan was a very hard worker. He came into the office every morning before 7:30, so he could review all of the work his law clerks had left him late the night before. He met with the clerks every morning for coffee for an hour, during which time we discussed the cases on the docket, drafts of opinions we had written, or cert petitions he'd reviewed by himself. He was the only Justice who read all the cert petitions himself. We also talked about the Vietnam War, Watergate, and the Washington Redskins. Brennan was a real person. He was smart, kindhearted, thoughtful, and exuberant.

The '73 Term was difficult for Brennan. It was personally difficult because his wife was very ill during that time, but also difficult because it was a year of transition. When he arrived at the Court, during the heyday of the Warren era, he was a central figure in putting together many of the Court's momentous majority opinions. Brennan was famous for his ability to forge compromises and round up the fifth vote. He reveled in that role.

But with the appointment by President Nixon of Rehnquist, Blackmun, Powell and—who am I forgetting? Burger, yes, of course, Burger. That's Brennan speaking through me! Forget Burger, right? With that change in the makeup of the Court, Brennan's role changed. As the center of the Court shifted significantly to the right, Brennan increasingly found himself in dissent.

Although he later came to relish the role of the dissenter, he certainly wasn't yet there. At this point, he very much felt personally the defeats in the Court. These were defeats, he felt, not only for himself, but for the nation. On more than a few occasions, he came back from conference, sat down with his three law clerks, and ran through the votes at conference with tears in his eyes. He was deeply frustrated, and sometimes quite angry, that these Justices were dismantling some of the achievements of the Warren Court.

Two cases in the 1973 Term illustrate a lot about Brennan. They give a concrete sense of Brennan's efforts to recruit the often elusive "fifth vote," the meaning of Brennan's conception of the living Constitution, and the extent to which Brennan, like all justices and judges, was influenced by his own personal background and values. For Brennan, I think the central formative experience concerned his father, who was a labor organizer in New Jersey, and who suffered oppression and even police beatings in his effort to promote the cause of labor. I think this helped Brennan develop a healthy skepticism about the government's

treatment of racial and other minorities, political and religious dissenters, and other outsiders. I think this shaped his understanding of the Constitution, his role as a Justice, and his conception of a living Constitution.

So, let me briefly offer two examples. The first were the obscenity cases decided in 1973, *Miller v. California*,[40] and *Paris Adult Theatre I v. Slaton*.[41] These cases represented the Court's first comprehensive attempt to revisit the issue of obscenity since 1957, when Brennan wrote the majority opinion for the Court in *Roth v. United States*,[42] holding that obscenity is not protected by the First Amendment.

By 1973, Brennan had come to the view, as had Justices Marshall, Stewart, and Douglas, that the challenge of defining obscenity with sufficient clarity to meet First Amendment standards was simply insurmountable. They therefore concluded that there needed to be a sharper limitation on the scope of the doctrine. Brennan concluded that obscenity could not constitutionally be restricted for consenting adults.

The question was whether Brennan could get the fifth vote he needed to make this the majority view. As it turned out, Brennan decided that Justice Powell was his best prospect, and Brennan worked tirelessly on Powell for months leading up to the oral argument in the case. Powell indicated that he was open to Brennan's approach. As he thought about Brennan's arguments, Powell suggested that he was inclined in this direction.

Now, the problem was that Powell, a white Southern gentleman, had a vision of obscenity that consisted of something like *Lady Chatterley's Lover*,[43] or *Tom Jones*.[44] When he went into the Supreme Court's movie theater to see the very raunchy films that were actually at issue in these cases, he was shocked. As Brennan later told the story, as he and Powell walked out of the Supreme Court theater, Powell turned to Brennan and said, "You lose." And so Brennan never got his fifth vote. In the end, he wrote the lead dissenting opinion. Nonetheless, this case illustrates the efforts Brennan made to get the fifth vote, the frustration he felt when he did not succeed, and also his idea of a living Constitution.

Part of the idea of a living Constitution for Brennan was that the Court should learn with experience. One of the things Brennan learned in the obscenity context was that the doctrine didn't work very well in practice. Thus, although Brennan continued to believe, in principle, that obscenity is not protected speech, he also came to the view that it needed to be more narrowly defined and more limited in its application, in order to function well in the real world.

The second example is *Frontiero v. Richardson*,[45] which Rosalie already mentioned. In *Frontiero*, Brennan took the view that discrimination against women is in many ways analogous to discrimination against African-Americans

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40. 413 U.S. 15 (1973).
41. 413 U.S. 49 (1973).
42. 354 U.S. 476 (1957).
43. D.H. LAWRENCE, LADY'S CHATTERLEY'S LOVER (Penguin Books 1994) (1928).
44. HENRY FIELDING, TOM JONES (1922).
45. 411 U.S. 677 (1973).

and is therefore presumptively unconstitutional under the Equal Protection Clause.[46] Brennan reasoned that, even though the Court had never interpreted the Equal Protection Clause in this way, society had changed so greatly over the years that our understanding of "equality" must change as well.

In this case, too, Brennan was disappointed in his hope to get a majority to embrace his view. In conference, the Justices had voted 8-1 to invalidate the law, but they had voted to do so on the ground that the law was irrational. On further reflection, Brennan decided that this was an intellectually dishonest position, because the challenged law was clearly rational under the Court's accepted doctrine. He therefore argued instead that women constitute a "suspect class" and that discrimination against women therefore requires strict scrutiny. Justices Marshall, Douglas, and White promptly joined Brennan's opinion. And then there was silence. Months passed. Justices Powell and Stewart, the two members of the Court most likely to join Brennan's opinion, both argued that it was unwise for the Court to reach this issue in light of the fact that the Equal Rights Amendment was still pending. In the end, they filed separate concurring opinions,[47] arguing that the law was irrational, and Brennan never got his fifth vote.

These examples illustrate how Brennan acted out of his conception of a living Constitution, how he tried to pull together a majority opinion, and by the 1973 Term how frequently he was frustrated in his effort to do so. It was, for Justice Brennan, a trying year.

Thank you.

JUSTICE BOEHM:

Well, I was at the Court almost a decade before my two colleagues and at the height of what was then perceived to be the Warren Court. You had *Mapp v. Ohio*[48] in 1961 and *Gideon v. Wainwright*[49] in '62. These are still cases that I expect most lawyers recognize by case name, even those who don't practice criminal law. And then we ended up with *Reynolds v. Sims*[50] that I'll talk about some more later, all of which were viewed as revolutionary decisions at the time. Most of them were 5-4 decisions. Each of them set a major conflict in place between structural considerations of federalism and basic questions of human liberty, and came out in each case essentially on the side of the Equal Protection Clause[51] and the Due Process Clause,[52] trumping whatever federalism or other considerations were thought to be in play. But to speak about the Chief, as we all called him, as a human being, he, too, was a product of his history, which as I think most of you know, was essentially as a politician. He was an extremely successful governor of California. Before that he was the attorney general. He

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46. U.S. CONST. amend. XIV, § 1.
47. *Frontiero*, 411 U.S. at 691 (Stewart, J., concurring); *id.* (Powell, J., concurring).
48. 367 U.S. 643 (1961).
49. 372 U.S. 335 (1963).
50. 377 U.S. 533 (1964).
51. U.S. CONST. amend. XIV, § 1.
52. U.S. CONST. amend. XIV, § 1.

was a baseball fan, a schmoozer, a politician par excellence, and a man of enormous personal charm and dignity and compassion. I don't know anybody who didn't like him.

We also had our post-Friday conferences as law clerks with our Justice. I don't know if every chamber did this, but the drill would be conferences were always on Friday at that time. And after the conference adjourned, the clerks would be called in to explain the results.

And occasionally, you'd have a case where the results surprised me. One example that sticks in my mind today is a case where we had a cert petition from the Alabama Supreme Court by a man who was the then president of the Alabama NAACP, who had been arrested by a state trooper in Alabama, and they had convicted him of—I've forgotten what—disorderly conduct or something. And I had looked at this case left, right and sideways and concluded that they had adequate state law grounds for doing everything they'd done, and there really wasn't anything we could do about this, even though it certainly looked like an abuse of power. And we come back from conference and the Chief says, "Well, we've granted cert." I said, "Well, what do you think about that?" And he said, "They can't do that." That was—and he was right. He was right. All the fancy *Harvard Law Review* analysis that I'd come up with reached the wrong result.

And that was based, in the Chief's view, on his understanding of how the world really worked. He'd been a governor for three years. He'd dealt with state legislators. He knew how they operated. More about that later. And he brought that to the Court in a way that some people might feel is somewhat lacking in today's jurisprudence where we have a bench that is largely filled with people with appellate bench credentials and histories that can get you confirmed and produces a very highly qualified bench, but also has the effect of screening out people of the broad breadth of background of the Court I dealt with. You had Tom Clark, and Earl Warren, Justice Brennan, Justice Black, of course, was a senator.

And, by the way, if you could say there was a dominant figure in the Court in that day, it would be Black. He was the one who really staked out strong positions and stiffened the backbone of the other Justices and the majority, as perceived by me. And I think history has pretty much borne that out.

But the Chief was also a great human being. And he would take us to the late, not particularly lamented Washington Senators games, and there we'd be in a box with Sergeant Shriver watching a ball game and just enjoying a ball game. The other thing he would do is, the drill was we'd all work on Saturday mornings and then go to lunch at a place called the National Lawyers' Club, which I think passed away many years ago. At least I haven't heard of it for many years. But it was on, I think, H Street in Washington, and it was just what you'd expect it to be, an all male, all lawyers luncheon club. And we'd have lunch for maybe two or three hours. And those two or three hours would be spent almost exclusively on sports and politics, hardly ever touching on a matter of law. The Chief loved to just schmooze on subjects of general interest. And he was very good at it. He was a charming guy. It was a great experience.

PROFESSOR LEVINSON:

Thanks to all of you for providing wonderful insights into the character of

these three Justices. I guess I would make one observation. Although members of the Court in the 1960s and '70s may have reflected a better cross section of experiences, we should remember that there was no woman's voice, no female Justice until a decade later. But I would like now to zero in on what each of you believes was the most significant decision that your Justice wrote or dissented from while you were clerking and/or maybe the most difficult case.

PROFESSOR TUSHNET:

For me, probably it was the dissent in the *Rodriguez* school finance case,[53] which I didn't work on. Another one of my co-clerks worked on it as his primary job for several months. And it was not difficult, it was disappointing because the judge thought correctly that at some level his career had been built on the notion that equality with respect to education was the foundation of equal citizenship in the United States. And here were these kids who, as he saw it, weren't being treated equally, weren't getting the kind of education that other kids were getting. The doctrinal issues were tricky, but not insurmountable.

After *Rodriguez* was handed down, another historian showed Justice Marshall a draft opinion in *Brown v. Board of Education*[54] in which Chief Justice Warren had written that education was a fundamental right in the United States. Warren revised the opinion and took out that particular phrasing. Marshall said that, if he had published that, he would have made my job in *Rodriguez* much easier. And it was disheartening to him that the majority couldn't see what he thought was so obvious, that, if there was anything that the United States should be committed to, it should be equality with respect to education.

PROFESSOR LEVINSON:

May I ask a quick follow-up question on equal educational opportunity? A year ago, in *Parents Involved*,[55] the United States Supreme Court struck down efforts by two school districts to achieve desegregation by using race as a factor in assigning students to public schools. In his opinion, Chief Justice Roberts invoked *Brown v. Board of Education* to invalidate the plans.[56] Any comments on that, Mark?

PROFESSOR TUSHNET:

Well, this is a case that was made for the phrase that, if Justice Marshall were alive today, he'd be turning over in his grave. The particular quotations that the Chief Justice used from both *Brown* and more important from the oral argument in *Brown* were accurate, and they were statements about color-blindness and the impropriety of using race as a basis for assigning kids to schools. That's what they said. I found it interesting that the quotation is from an oral argument made by Robert Carter,[57] rather than by Thurgood Marshall. Marshall said the same

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53. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 73 (1973) (Marshall, J., dissenting).

54. 347 U.S. 483 (1954) (*Brown I*).

55. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

56. *Id.* at 746 (citing Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300 (1955); *Brown I*, 347 U.S. at 483).

57. *Id.* at 747 (citing Transcript of Oral Argument at 7, *Brown I*, 347 U.S. at 483 (Robert L.

things when he argued, but the Chief Justice quoted Carter rather than Marshall, I think, out of a strategic sense. It's one thing to say Robert Carter said this. It would be an insult to Thurgood Marshall to quote Marshall for this decision.

So, Marshall and Carter did say you can't use race as a basis for assigning kids to schools. There's no question about that. But they said that in the service of a larger vision about what racial equality with respect to education was. The goal was integration, not merely eliminating the use of race as a categorizing device. And they said that, as well. They said the goal is integration. There are parts of the *Parents Involved* decision that are, I think it's fair to say, disingenuous. This part isn't in particular disingenuous, it's just, again, extremely disappointing.

PROFESSOR LEVINSON:

Thank you. Let's move on to Professor Stone?

PROFESSOR STONE:

Certainly the most momentous decision the Court handed down in our Term was *Roe v. Wade*.[58] Although Brennan didn't write an opinion in *Roe*, he played a major role behind the scenes in helping Blackmun craft an opinion that would both win the Court and be more persuasive than some of the early drafts that had been circulated. So, in our chambers, we were very much involved in *Roe*. The outcome in *Roe* was fairly clear from early on, but the way the opinion would be written, how broad or narrow the decision would be, was very much in doubt.

For Brennan, *Roe* was an interesting challenge. As the Court's only Catholic Justice, he clearly felt a personal tension between his religious and moral beliefs about abortion, on the one hand, and his responsibilities as a Justice in interpreting the Constitution, on the other. Although Brennan did not often discuss this with the clerks, we did get a sense of how important it was to him not to allow his religious beliefs affect his position. But at the same time, he also wanted to make sure that his desire *not* to be affected by his religious beliefs did not lead him to a legal judgment that was not a sound one. It was impressive to watch the way he worked this through.

The Justices understood, of course, that *Roe* was an important, difficult, and controversial decision that would have a substantial effect on society. They also knew that the decision would have a certain degree of short-term political fallout, but I don't think anyone within the Court—Justices or law clerks—had the faintest idea that we'd be today still talking about *Roe v. Wade* as a fundamental factor in American politics thirty-seven years later. I don't think any of the Justices would have predicted that.

The first inkling we got of the depth of the reaction to *Roe* was from the mail response to the decision. The Court was inundated with mail, mostly critical. The boxes were piled up from floor to ceiling in the hallways of the Supreme Court. The Court had never seen anything quite like this. The only people who really were interested in going through all this mail were some of the law clerks who had gone on job interviews and were waiting for their reimbursement checks.

Carter, Dec. 9, 1952)).

58. 410 U.S. 113 (1973).

They were the ones who were still there at two in the morning elbow deep in the boxes trying to find their money.

The two Justices who received the most mail were Blackmun and Brennan, Blackmun because he authored the opinion, Brennan because he was Catholic. Most of the letters were from children in parochial schools. They were usually form-letters accusing the Justices of murdering babies. The tone of many of the letters was pretty brutal. Brennan and Blackmun had very different responses to the mail. Brennan's approach was not to read it. He felt such correspondence was not relevant to his role as a Justice, so for the most part he just put it aside.

Blackmun, on the other hand, seemed fascinated by these letters. There was a moment when I saw Blackmun, which I thought was very poignant. Over time I've come to believe, perhaps unrealistically, that that moment was pivotal in Blackmun's evolution as a Justice and as a person. It was late at night, maybe one or two in the morning, and I was still in the Court working on something or other. I was dealing with a case with one of Blackmun's law clerks. I went to Blackmun's chambers to see if the clerk was still around. Everyone was gone, except Blackmun. All the lights were out in Blackmun's chambers, except for a small green reading light on Blackmun's desk. He was sitting there, almost in the dark, with his glasses down around his nose and a big pile of these letters on his desk. He was reading them, one by one. I remember just standing there silently, watching him, and it struck me as so moving that he was allowing himself to feel the pain of being the target of such animosity, condemnation, and disapproval.

What I came to believe over time is that it was this experience that changed Blackmun as a person and that led him to be someone who, like Marshall, Brennan, and Warren, began to think about the outsiders in society, about what it felt like to be a dissenter, to be the one who is despised. I think that experience initiated an important transition in Blackmun's understanding of his responsibilities as a Justice, and ultimately changed the way he fulfilled his judicial responsibilities. I believe this capacity for empathy—to use an overused term these days—made him a better Justice.

PROFESSOR LEVINSON:

Thank you.

As a side note, Professor Stone, I recall that you wrote a piece after the very controversial *Gonzales*[59] decision sustaining the federal "partial birth abortion" statute, in which you noted that all five of the Catholics on the Court were in the majority, whereas the four non-Catholics joined in the dissent.[60] It was important to Justice Brennan to keep his religious beliefs separate from his legal opinions. Professor Stone, isn't it fair to say more broadly that Justice Brennan was a separationist when it came to the Establishment Clause,[61] while he also authored *Sherbert v. Verner*,[62] in which he advocated a very protective interpretation of the

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59. Gonzales v. Carhart, 550 U.S. 124 (2007).

60. Posting of Geoffrey Stone to The Faculty Blog, http://uchicagolawtypepad.com/faculty/2007/04/our_faithbased_.html (Apr. 20, 2007, 15:01).

61. U.S. CONST. amend. XIV, § 1.

62. 374 U.S. 398 (1963).

rights of religious minorities under the Free Exercise Clause.[63]

PROFESSOR STONE:

Right. Brennan had strong views about religious freedom. I think "separationist" is the right way to put it. He believed deeply in the separation of church and state. He also believed deeply in the protection of religious minorities, as he believed in the protection of any minority group. He therefore championed the view that laws that had disparate effects on minority religions must be considered very carefully and merited serious scrutiny.

Now, let me say a word about the piece I wrote about *Gonzalez*.[64] Six years before *Gonzalez*, the Court, in a 5-4 decision, struck down a Nebraska statute prohibiting partial birth abortions, because the law did not have an exception for the life or the health of the mother.[65] In *Gonzalez*, the Court considered a federal law prohibiting partial birth abortions that also did not include an exception for the life or the health of the mother. But this time, the Court, in a 5-4 decision, upheld the law.[66] In my view, the opinion in *Gonzalez* was completely disingenuous in its effort to distinguish the earlier decision. The only real change, as far as I was concerned, was that Justice O'Connor had been replaced by Justice Alito.[67] O'Connor had been the fifth vote in the first case.[68] Alito was the fifth vote for the opposite result in *Gonzalez*.[69]

In the op-ed you've referred to,[70] I asked, what is it about this issue that would drive these Justices to feel such a powerful need to produce so disingenuous an opinion? Why couldn't they just either follow the clearly controlling precedent or, if need be, be honest about it and take up the challenge of directly overruling it (which I didn't think it could justify in any principled way)?

I noticed that all five Justices in the majority in *Gonzalez* were Catholic. That led me to write the piece, wondering whether the religion of the Justices had affected their conduct. As I've already noted, I do believe that Justices are affected by their personal experiences and values, and this is true of conservative Justices as well as of liberals. So I posed the question whether these Justices might have been unwilling to follow the precedent because they so despised the idea of partial birth abortion that they just could not "morally" bring themselves to do so. I contrasted this scenario with how I had seen Justice Brennan struggle with this challenge in *Roe*.[71]

This piece received much more attention on the Internet than I had

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63. U.S. CONST. amend. I.

64. *Gonzales*, 550 U.S. at 124.

65. Stenberg v. Carhart, 530 U.S. 914 (2000).

66. *Gonzales*, 550 U.S. at 168.

67. Adam Liptak, *O'Connor Casts a Long Shadow on the Nominee*, N.Y. TIMES, Jan. 12, 2006, at A1.

68. *Carhart*, 530 U.S. at 918-19.

69. *Gonzales*, 550 U.S. at 130.

70. *See* Posting of Geoffrey Stone, *supra* note 60.

71. *Id.*

expected,[72] but the most interesting response was from Justice Scalia. He had been my colleague on the faculty at the University of Chicago in the 1970s, and we were friends. A student came to me about six months after this piece was published, and said, "Did you know that Justice Scalia said that he would not set foot in the University of Chicago Law School again as long as you're on the faculty?" I said, "Not possible. That's ridiculous."

Then about six months ago Joan Biskupic, a very fine reporter and author, called me to say she was writing a biography of Scalia[73] and wanted to discuss his reaction to my piece on *Gonzalez*. She said that during one of her interviews of Scalia, she'd asked him about my piece, and he had jumped up from his chair and exclaimed, among other things, "I'm never going to set foot in the University of Chicago Law School again as long as Stone is on the faculty." In effect, he accused me of being bigoted against Catholics, although that missed my point entirely. To get the full account of this incident, you should read Biskupic's book, *An American Original*,[74] which is actually quite good. The point is simply that these issues touch nerves.

JUSTICE BOEHM:

Well, the answer to the most important decision in my Term is easy. The Chief himself thought that *Reynolds v. Sims*[75] was not only the most important decision of the 1963 Term,[76] but the most important decision of his tenure on the Court, including *Brown v. Board of Education*[77] and all the other decisions. Often when I make that comment I get a lot of raised eyebrows, particularly from younger audiences that have never heard of *Reynolds v. Sims*. Many people seem to think that there is a one person, one vote clause in the Constitution somewhere. Not so.

Reynolds v. Sims was a decision involving the apportionment of the Alabama state legislature, which was severely mal-apportioned.[78] Let me describe the situation in Indiana since this is largely a Hoosier audience. In Indiana, the 1960 election when John Kennedy was elected president, was conducted on legislative and congressional maps that were based on the 1920 census.[79] There had been no reapportionment for forty years. And a culture of "let's continue to protect our own backsides" had dominated the legislature to the point where reapportionment was a subject that was really largely off the table within the legislature.

In the meantime, beginning from 1920 to 1960, as you might expect, there

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72. Posting of Geoffrey Stone to The Faculty Blog, http://uchicagolaw.typepad.com/faculty/2007/04/faith_based_jus.html (Apr. 25, 2007, 9:09).

73. JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA (2009).

74. *Id.* at 202-05.

75. 377 U.S. 533 (1964).

76. The case was argued November 13, 1963 and decided June 15, 1964. *Id.*

77. 347 U.S. 483 (1954) (*Brown I*).

78. *Reynolds*, 377 U.S. at 537-38.

79. Howard D. Hamilton et al., *Legislature Reapportionment in Indiana: Some Observations and a Suggestion*, 35 NOTRE DAME L. REV. 368 (1959-60).

had been dramatic shifts in the population centers of this state. At that time, Indiana had eleven congressional districts. The district in the southeastern quadrant of the state, that is one of the least populated and in many configurations came to be represented for many years by Lee Hamilton, had a population of roughly one fifth that of Marion County, which was also a congressional district. So, you had a five to one disparity in the numbers of people who were electing one congressman.

The same phenomenon existed in the state legislatures. It's more complicated to explain it because the districts were smaller. But basically, you had massive malapportionment of the state legislature in relationship to the population as it then sat. *Reynolds v. Sims* invoked the Equal Protection Clause[80] to hold that you can't do that. You have to essentially have one person, one vote in both houses of the legislature.

Now, this was highly controversial. As Professor Levinson noted, it restructured American democracy. What it did was shift the center of gravity of the state legislatures in many parts of the country, and certainly Indiana, essentially from rural and small town districts to the suburbs. It didn't so much shift it to the cities themselves, because they already were significant forces. But the suburban areas—to take Marion County that most people in this room are familiar with, at the time *Reynolds v. Sims* was decided, Indianapolis and the metropolitan area was all inside Marion County. The surrounding counties, the ones that those of us who live here call the "donut counties" around Marion County, were essentially rural and farm areas. As you know, Hamilton County to the north of Indianapolis is now the fifth most populated county in the state. The one person, one vote requirement didn't effect a shift of power from Democrats to Republicans or vice versa. But what it did is shift representation from small town and rural interests to suburban areas, and created a legislature that then proceeded over the ensuing several decades to be much more responsive to concerns like consumerism and environmentalism.

A lot of the relatively modest progressive movements that evolved through the '70s and '80s simply could not have happened at the state level without *Reynolds v. Sims* mandating that the legislatures fix this imbalance, which the fox in charge of that henhouse had no interest in fixing itself. And the effect of that was not just to enable a broad range of basically progressive movements to become implemented at the state level, it was also to revive federalism. It made the states more responsive in dealing with a lot of the problems that had, through the New Deal in successive years, because of a default by the state in dealing with them, been forced onto the federal agenda. And the result is of enormous historic consequence, I think. And the Chief was absolutely right. It cut across the board and affected virtually every aspect of American life.

I would like to comment on a case that didn't get decided—in a very peculiar way. The case that we thought that was going to be the biggest case of the 1963 Term was *Bell v. Maryland*.[81] Now, how many of you know *Bell v. Maryland*?

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80. U.S. CONST. amend. XIV, § 1.

81. 378 U.S. 226 (1964).

No?

Bell v. Maryland came to us as a sit-in case from Maryland.[82] It was a classic case of an African American that had been rejected admittance to a lunch counter. This had happened all over the country, and Mr. Bell brought his claim purely under the Fourteenth Amendment.[83] His claim was that the Fourteenth Amendment is self-effectuating, and prohibits discrimination in public facilities without need of any implementing legislation by Congress. That claim wended its way through the Maryland state courts and the Maryland Court of Appeals said, no, there's no such federal claim. Cert comes up to the U.S. Supreme Court and the case arrives about the same time I do in August of 1963.

This case, if decided in favor of the plaintiffs, would have been a judicial enactment of the Civil Rights Act of 1964, in effect. It would have been a declaration that the Constitution in and of itself, without any need of congressional action, prohibits discrimination on the basis of race in public facilities. And there's nothing in the case that would have restricted its application. It would have been *Brown* against the *Board*, not just for schools but for everything. You can imagine what a monumental decision this was.

Well, the case grinds forward, and on November 22, 1963, a date ingrained in the memory of most people my age, President Kennedy was killed. Lyndon Johnson becomes president, and over the course of the next several months, Johnson gets the Civil Rights Act through the Congress of the United States. The Maryland General Assembly then responds with a public accommodations law of its own in Maryland. And the case that is thought to become this historic, ultimate high water of—to use the term of opponents—an activist court, is decided on the basis that, well, Maryland might have changed its mind in light of this intervening legislation, so we're going to send the case back to Maryland to see whether, in the light of either the federal act or the state act, they want to change their minds on this prosecution. And as far as I know, that issue has never been resolved to this day, whether the Fourteenth Amendment would have achieved the same result without it. It would have been a yet unprecedented view of the state action requirement. There were all these arguments for state action. We license corporations. We provide police protection to them. There were a whole bunch of arguments as to what was sufficient.

PROFESSOR LEVINSON:

No. No, if anything the Court has generally narrowed the reach of the Fourteenth Amendment.

Justice Boehm, you were talking about *Reynolds v. Sims*,[84] which facilitated real democracy. It reminded me of campaign finance reform and the Court's recent decision that invalidated longstanding limits on corporate spending[85] and overturned Justice Marshall's opinion in the *Austin* case,[86] in which he decried the

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82. *Id.* at 227.

83. *Id.* at 228 (citing U.S. CONST. amend. 14, § 1).

84. 377 U.S. 533 (1964).

85. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

86. *Id.* at 913 (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990)).

corrosive effect of corporate wealth on elections.[87] Because we don't have a lot of time left, it might be interesting to talk more broadly about judicial activism, as well as the current debate about the politicization of the Supreme Court. When all three of you clerked, the same complaints about the politicization of the Court were heard—just in the other direction. How, if at all, was the liberal Warren Court different?

PROFESSOR STONE:

I think there is a lot of similarity, at least in a superficial sense, between liberal activism and conservative activism. But I'd make two points about this issue. First, there is the problem of defining what we mean by a "conservative" justice. When Richard Nixon appointed Burger, Rehnquist, Blackmun, and Powell, they were thought of as conservative justices. But their understanding of conservatism meant that they believed in judicial restraint. They were appointed to resist the activism of the Warren Court. The conservative argument at the time was that activism is bad, passivism is good. The conservative Justice was thus one who would invalidate laws only in extraordinary circumstances, where the finding of unconstitutionality was clear. This was the prevailing conception of a conservative Justice throughout the era of the Burger Court. It is interesting, by the way, that despite that understanding, three of the four Nixon appointees voted in the majority in *Roe v. Wade*.[88] Without their support, the decision would have come out the other way.

Basically, though, judicial restraint was the catchword of judicial conservatism at that time. In American politics today, that remains the public conception of a conservative Justice. A conservative Justice "calls balls and strikes," and does not exercise any kind of activist judicial review. That is an entirely inaccurate description of the current conservatives on the Supreme Court, however. In decisions like *Heller*,[89] the Second Amendment case; *Citizens United*,[90] the corporate campaign finance case; and in the Court's affirmative action, commercial advertising, and federalism decisions, the Court's "conservative" Justices have been extremely activist. In all of those cases, and many more, Justices like Roberts, Kennedy, Scalia, Thomas, and Alito have been anything but restrained. They have used the power of judicial review every bit as actively as the Warren Court, but for different reasons. In short, we have seen a dramatic change in the meaning of judicial conservatism.

Unfortunately, the nature and magnitude of this change has not been understood by the public, which still clings to the idea that conservative Justices "apply the law" rather than "invent the law." Because of this, one of the most serious challenges for the American Constitution Society is to explain to the public that the conservative Justices are not neutral or passive in their interpretation of the Constitution, but are aggressively ideological.

The second point I'd like to make concerns the nature of judicial activism.

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87. *Austin*, 494 U.S. at 660.

88. 410 U.S. 113 (1973).

89. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

90. 130 S. Ct. at 876.

Justices Brennan, Marshall, Warren, and the other Justices of that era who were labeled activists had a fundamental vision of when it was appropriate for the Court to be muscular in its exercise of judicial activism. Basically, they thought judicial activism was warranted in two situations. First, they believed they had a special responsibility to protect the rights of religious dissenters, racial minorities, political dissidents, persons accused of crime, and others whose interests are likely to be inadequately protected in the majoritarian political process. Second, they believed the Court has a special responsibility to make sure that the channels of the political system itself are open and well functioning, as illustrated by such decision as *Reynolds v. Sims*[91] and *New York Times Co. v. Sullivan*.[92] Almost all of their most controversial decisions fell into one or both of those categories.

That is, in my view, a sensible and principled understanding of the proper role of the judiciary in our constitutional system. But if you try to make sense of the activism of today's conservative Justices, it's very difficult to come up with any kind of principled or coherent theory that would explain their activist judicial review. On what theory does the Supreme Court get activist on such issues as the rights of gun owners, the rights of corporations, the rights of commercial advertisers, the right of the Boy Scouts to exclude gay scoutmasters, and the rights of those who oppose affirmative action? As far as I can tell, there is no principled theory of judicial review or of the role of courts that explains this pattern of decisions. They just seem to correspond to the ideological predispositions of political conservatives. That, I think, is a serious problem with the current Court, and it is a profound difference between Warren Court-era judicial activism and Roberts Court-era judicial activism.

JUSTICE BOEHM:

One comment on keeping the channels of our political system working properly, which I take to mean making sure there aren't structural obstacles to the proper working of government. Just on a personal count, when I was still a private lawyer, I was lead lawyer for the plaintiffs in a case called *Bandemer* against *Davis*.[93] I think it became *Davis* against *Bandemer*[94] in the Supreme Court, which was the first case that got to the Supreme Court challenging gerrymandering as an equal protection violation. And it ended up in a 4-3-2 decision where Justice White wrote the four Justice plurality opinion. The Indiana General Assembly map in question was obviously a gerrymandered map. It included a mix of multi-member districts and single member districts—and districts that were drawn in a way that couldn't possibly be explained on any basis other than it was designed to elect a Republican legislature. But Justice White was joined by both Brennan and Marshall in the proposition that, whatever was going on in Indiana in the 1980 map, it wasn't bad enough according to the

91. 377 U.S. 533 (1964).

92. 376 U.S. 253 (1964).

93. 478 U.S. 109 (1986).

94. *Id.* at 113 (White, J., plurality opinion).

plurality opinion.[95]

PROFESSOR LEVINSON:

And we've never figured out what's bad enough, right?

JUSTICE BOEHM:

Nobody's ever come up with anything that is bad enough. There's been a subsequent Pennsylvania case that wasn't bad enough,[96] and so the level to which Blackmun and Justices Brennan and Marshall were willing to go to open up those channels obviously had limits—although one way to look at that decision is you weren't going to get a five-Justice majority anyway, so go along with Justice White's opinion. I don't know what was in their brains.

PROFESSOR TUSHNET:

I have, I think, just two comments. I would emphasize something that Geoff said in passing, which is that there is an account of *when* the Roberts Court is activist. The account says, it's activist by reading the Republican platform. If we could get that idea across, that would be pretty effective, because I don't think people think that the Constitution is the Republican platform.

The other thing is this. It would be really nice if the next nominee for the Supreme Court got up and said,

> Damn right, I'm going to be an activist. If the Constitution says the statute is unconstitutional, I'm going to find it unconstitutional. And if it doesn't say it's unconstitutional, I'm not going to find it unconstitutional. That's just what Roberts and Alito do. I'm not going to do anything different.

People associated with the liberal or progressive side have been scared away from the word activism when the phenomenon of activism has shifted to the other side of the spectrum. I never know quite whether this is exactly appropriate, but there's a U2 performance of the song "Helter Skelter."[97] They open up with Bono saying, "Charlie Manson took this away from us, we're going to take it back." I think that's what we ought to do about activism. We ought to take it back.

PROFESSOR LEVINSON:

I think that's an important observation. Statistically, the Rehnquist Court, for example, overturned more acts of Congress than all previous Supreme Courts combined.[98] This concept of activism is certainly a two-way street.

We are running short on time, so would each of you like to sum up what you think was the greatest contribution of your Justice? We will then have a little time for comments and questions from the audience.

PROFESSOR TUSHNET:

Well, for me, it's *Brown v. Board of Education*.[99] That was his opinion, as

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95. *Id.* at 143.

96. Vieth v. Jubelirer, 541 U.S. 267 (2004).

97. U2, HELTER SKELTER (Island 1988) (cover of THE BEATTLES, HELTER SKELTER (Apple Records (1968)).

98. THE CONSTITUTION IN 2020, at 39 (Jack M. Balkin & Reva B. Siegel, eds. 2009).

99. 347 U.S. 483 (1954).

far as I'm concerned.

PROFESSOR LEVINSON:

And his work to make that happen. That's true.

PROFESSOR STONE:

For Brennan, I think it was the First Amendment. Brennan became a vocal champion of the First Amendment during his tenure on the Court and he was an extremely important and influential thinker about the meaning of free speech. That is probably his greatest achievement. He transformed the way we think about the freedom of speech and press.

JUSTICE BOEHM:

All of the above. The Chief was able to get a majority together and sometimes even a unanimous Court on extremely controversial subjects. To try and pull one of them out, just try and consider what America would be like without some of these keystones.

DINO POLLOCK:

We're going to take the last five, six minutes or so to take your questions. If you would, please stand up or raise your hand, we'll recognize you and then you can address your question to either the entire panel or one particular panelist.

UNKNOWN SPEAKER:

This is to Justice Boehm. Did Earl Warren ever discuss the internment of Japanese during World War II, during your time?

JUSTICE BOEHM:

Not with me. I don't—I never heard him address the subject.

UNKNOWN SPEAKER:

Justice Scalia once said that no other Justice was as powerful as Justice Brennan because the Constitution was this pliable thing, the notion of which was such that he could say, oh does it mean one hundred percent, does it mean fifty percent, what does it mean, where as I, Justice Scalia, see a document and I make decisions based on that. My second question is that based on his view that if you look at the language as it was understood by objective person at that time, which in 1791 meant sabers and muskets, do you feel like the *Heller* decision betrayed what he purports to be as his perspective?

PROFESSOR STONE:

Well, the danger in a kind of open-ended and aspirational conception of the Constitution is that it can be an unbounded premise on which to interpret the often very ambiguous words of the Constitution. That is a potential problem. We need some constraint to give a sense of structure, direction, and legitimacy to constitutional interpretation.

It is certainly possible, however, to identify the values that are the central aspirations of those provisions and that can be analyzed in an appropriate, constrained, and logical manner. But the challenge is certainly a real one.

With respect to Scalia, I'm not a great fan of his version of originalism. First of all, though, I should emphasize that I think the idea of an aspirational, living constitutionalism is originalist. That methodology attempts to implement an originalist meaning, but with the recognition that, in adopting phrases like,

"Congress shall make no law abridging the freedom of speech,"[100] or "no state shall deny any person the equal protection of the laws,"[101] or inflict upon any person "cruel or unusual punishments,"[102] the Framers were not enacting a specific code with a clearly defined meaning. Rather, they understood full well that they were adopting provisions that were vague, open-ended, and would have to gain meaning over time.

On the other hand, the form of originalism that seeks to fix the meaning of these provisions in terms of what the Framers specifically intended or expected is largely a ruse. For one thing, the Framers themselves never intended the Constitution to be construed in this way, so the basic premise of this sort of originalism is inherently contrary to originalism. But beyond that, lawyers are not particularly good historians and, in any event, we often know very little about what the Framers themselves actually intended or expected. As a consequence, when purporting to undertake this sort of inquiry, "originalists" typically go through the following thought process: "Well, what did the Framers intend? Well, the Framers were reasonable people. I'm a reasonable person. So, the Framers must have intended what I would have intended had I been there at the time." So, conservative "originalists" hold affirmative action unconstitutional, they hold that the Boy Scouts have a First Amendment right to exclude gay scoutmasters, they hold the regulation of guns unconstitutional, they hold that corporations have First Amendment rights, and so on. None of that is in any credible way an "originalist" understanding of the Constitution. Rather, such decisions simply illustrate how "originalist" Justices smuggle their own values into the Constitution by conveniently attributed them to the Framers, who (for all we know) never held them.

MR. POLLOCK:

Yes. Justice Sullivan?[103]

JUSTICE SULLIVAN:

Let me just say that Professor Tushnet's provocative comment that we should recapture the term activism, isn't it true that a century ago the activists were the conservatives? And so, the call for recapturing seems to have a very sound basis in history after all the *Lochner*[104] Court was criticized for activism, right?

PROFESSOR TUSHNET:

Certainly. Another way of putting the point about recapturing the term "activism" is that, what we on my side of the political spectrum need to do is remove the term activism from the vocabulary because it doesn't tell us anything. There are conservative activists and there are liberal activists. If you're a liberal, you want liberal activism and you don't want conservative activism. But it's not activism that's at stake. It's the aspirations of the Constitution. There are

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100. U.S. CONST. amend. I.

101. U.S. CONST. amend XIV, § 1.

102. U.S. CONST. amend. VIII.

103. Indiana Supreme Court Associate Justice Frank Sullivan.

104. Lochner v. New York, 198 U.S. 45 (1905).

conservative visions of an aspirational Constitution, too. That's a discussion we could have. But having a discussion about whether somebody's an activist or not is just not productive.

MR. POLLOCK:

Thank you so much for coming out and we appreciate your time.

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NOTES

RECALLING WHAT CONGRESS FORGOT: *LEDBETTER*'S CONTINUING APPLICABILITY IN FHA DESIGN-AND-CONSTRUCTION CASES AND THE NEED FOR A CONSISTENT LEGISLATIVE RESPONSE

LAURA KATHERINE BOREN*

INTRODUCTION

In 1988, Congress made "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream" when it enacted the Fair Housing Amendments Act.[1] The Act amended Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act (FHA).[2] The amended FHA requires, among other things, that all new covered multifamily housing be designed and constructed in accordance with seven accessibility features specified in 42 U.S.C. § 3604(f)(3)(C).[3] Twenty years later, the congressional mandate has been largely ignored.[4] Several studies have revealed substantial noncompliance with § 3604(f)(3)(C).[5]

When interpreting the FHA, courts regularly turn to judicial interpretations

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1. H.R. REP. NO. 100-711, at 18, 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179, 2184. Prior to the passage of the Fair Housing Amendments Act, the FHA prohibited discrimination on the basis of race, color, national origin, religion, and sex. *Id.* at 13. The Fair Housing Amendments Act added "handicap" as well as "familial status" to the list of prohibited bases for discrimination. *Id.* at 18-19. Although the FHA uses the term "handicap" rather than "disability," its definition of "handicap" is identical to the definition of "disability" in other federal civil rights statutes. Therefore, this Note uses the terms interchangeably. *See* 29 U.S.C. § 705(9) (2006); 42 U.S.C. § 12102(2) (2006); *see also* Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753, 753 n.4 (2006) [hereinafter Schwemm, *Barriers*].

2. H.R. REP. NO. 100-711, at 15, 18, *reprinted in* 1988 U.S.C.C.A.N. at 2176, 2179.

3. 42 U.S.C. § 3604(f)(3)(C) (2006).

4. *See* Schwemm, *Barriers*, *supra* note 1, at 768-70.

5. *Id.*

of Title VII of the Civil Rights Act of 1964[6] for guidance.[7] In *Ledbetter v. Goodyear Tire & Rubber Co.*,[8] the Supreme Court held that a plaintiff's Title VII wage discrimination claims were time-barred.[9] The Court held that the event that triggered the statute of limitations was the discriminatory pay-setting decision, and the plaintiff's continued receipt of smaller paychecks due to discriminatory decisions made outside the charging period could not revive her expired claims.[10]

Recently, in *Garcia v. Brockway*,[11] the U.S. Court of Appeals for the Ninth Circuit relied heavily on *Ledbetter* to hold that the statute of limitations for FHA design-and-construction claims "is . . . triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued."[12] *Garcia* severely impairs the FHA's accessibility provisions because it totally forecloses private design-and-construction suits two years after a covered multifamily dwelling is built, regardless of whether any interested individual was aware of or harmed by the accessibility deficiencies during that time.[13]

Subsequent to the Ninth Circuit's *Garcia* decision, Congress acted to override *Ledbetter* with respect to wage discrimination claims by passing the Lilly Ledbetter Fair Pay Act of 2009 (Ledbetter Act).[14] The question of whether and to what extent *Ledbetter* will continue to impact nonwage discrimination suits, including FHA design-and-construction suits, remains unanswered. Despite Congress's disapproval of *Ledbetter*, courts are likely to continue to rely on *Ledbetter* to narrowly interpret the FHA's design-and-construction provisions.[15]

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6. 42 U.S.C. § 2000e (2006).

7. The Supreme Court relied on Title VII precedent in interpreting the FHA in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). The lower courts have followed suit. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004, 1008-09 (7th Cir. 1996); Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745 n.1 (9th Cir. 1996); Huntington Branch of the NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). *See generally* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 7:4 (2008) [hereinafter SCHWEMM, HOUSING DISCRIMINATION].

8. 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 and 42 U.S.C.).

9. *Id.* at 628.

10. *Id.* at 628-29.

11. 526 F.3d 456 (9th Cir.) (en banc), *cert. denied*, 129 S. Ct. 724 (2008).

12. *Id.* at 461-62.

13. *Id.*

14. The Ledbetter Act was signed into law on January 29, 2009. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 and 42 U.S.C.). *Garcia* was decided in May 2008. 526 F.3d at 456.

15. *See* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 516-17 (2009) (noting "the general tendency by courts to construe narrowly the significance of Congress' disapproval of prior holdings and instead rely upon the statutory analysis contained in the overridden decisions").

This Note explores *Ledbetter*'s impact on the statute of limitations analysis in FHA design-and-construction claims both before and after the Ledbetter Act. Part I provides an overview of the FHA's disability discrimination provisions and enforcement mechanisms, its legislative history, and the basic principles that guide its interpretation. Part II discusses the statute of limitations analysis in Title VII wage discrimination claims chronologically, from *Ledbetter* to the Ledbetter Act. Part III explores *Ledbetter*'s impact on FHA design-and-constructions claims as manifested in *Garcia*. Part IV analyzes *Garcia* and its shortcomings. Finally, Part V contends that, despite the legislative override, courts will continue to apply *Ledbetter* in FHA design-and-construction cases and argues that Congress should pass a legislative solution to close the enforcement loophole the Ledbetter Act left open.

I. BACKGROUND OF DISABILITY DISCRIMINATION UNDER THE FHA

The FHA prohibits housing discrimination on the basis of handicap in many forms.[16] The FHA defines "handicap" as "(1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment."[17] Federal regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[18] Courts have determined that a wide variety of impairments constitute handicaps for the purposes of the FHA, including mobility impairments,[19] HIV and AIDS,[20] and past substance abuse.[21]

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16. *See, e.g.*, 42 U.S.C. § 3604(c) (2006) (making it unlawful to "make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates . . . discrimination based on . . . handicap"); *id.* § 3605 (making it unlawful to discriminate on the basis of handicap in residential real estate transactions); *id.* § 3617 (making it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment" of rights granted under the FHA).

17. 42 U.S.C. § 3602(h)(1)-(3).

18. 24 C.F.R. § 100.201(b) (2008).

19. *See, e.g.*, Garcia v. Brockway, 526 F.3d 456, 460 (9th Cir.) (en banc), *cert. denied*, 129 S. Ct. 724 (2008).

20. *See, e.g.*, Giebeler v. M & B Assocs., 343 F.3d 1143, 1147-48 (9th Cir. 2003) (holding that individual with AIDS was handicapped within the definition of the FHA); Support Ministries for Pers. with AIDS, Inc. v. Vill. of Waterford, N.Y., 808 F. Supp. 120, 129 (N.D.N.Y. 1992) (holding that HIV-infected individuals were handicapped for the purposes of the FHA, even though they were capable of caring for themselves).

21. *See, e.g.*, Reg'l Econ. Cmty. Program, Inc. v. City of Middletown, 294 F.3d 35, 46-48 (2d Cir. 2002) (holding that recovering alcoholics were handicapped within the meaning of the FHA).

A. FHA Accessibility Requirements

Although the FHA prohibits many types of disability discrimination,[22] this Note focuses on 42 U.S.C. § 3604(f).[23] Section 3604(f)(1) of the FHA makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap."[24] Section 3604(f)(2) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap."[25]

In addition to these general prohibitions, § 3604(f) includes three special provisions.[26] First, § 3604(f)(3)(A) and (B) provide that the "refusal to permit . . . reasonable modifications" to the premises and the "refusal to make reasonable accommodations in rules, policies, practices, or services" necessary to allow a disabled person to use and enjoy the premises are discrimination for the purposes of § 3604(f).[27] Section 3604(f)(3)(C) lays out the FHA's accessibility requirements, providing that for the purposes of § 3604(f), discrimination also includes:

> [I]n connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that--
> (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
> (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
> (iii) all premises within such dwellings contain the following features of adaptive design:
> (I) an accessible route into and through the dwelling;
> (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
> (III) reinforcements in bathroom walls to allow later installation of grab bars; and
> (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.[28]

For the purposes of § 3604(f)(3)(C), "covered multifamily dwellings" means all units in buildings with elevators and four or more units, as well as ground-floor

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22. *See, e.g.*, 42 U.S.C. §§ 3604(c), 3605, 3617 (2006).
23. *Id.* § 3604(f).
24. *Id.* § 3604(f)(1).
25. *Id.* § 3604(f)(2).
26. *Id.* § 3604(f)(3)(A)-(C).
27. *Id.* § 3604(f)(3)(A)-(B).
28. *Id.* § 3604(f)(3)(C).

units in buildings without elevators that contain four or more units.[29]

B. FHA Enforcement Mechanisms

The FHA provides three enforcement mechanisms.[30] First, the Attorney General may commence a civil action upon belief that a defendant "is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the FHA]" or if "any group of persons has been denied any of the rights granted by [the FHA] and such denial raises an issue of general public importance."[31] The FHA does not prescribe a statute of limitations for suits under this section, but courts have held that the limitations period depends on the type of relief sought.[32] Courts have held that the statute of limitations for § 3614 actions seeking damages is three years and that the statute of limitations for actions seeking civil penalties is five years.[33] Actions seeking injunctive relief are not subject to any statute of limitations.[34]

Second, an "aggrieved person" may initiate an administrative complaint with the Department of Housing and Urban Development (HUD).[35] The FHA defines an "aggrieved person" as a person who "(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."[36] In order to be timely, a plaintiff must file an administrative complaint within one year after the discriminatory housing practice occurs or terminates.[37]

Finally, "[a]n aggrieved person may commence a civil action . . . not later than [two] years after the occurrence or the termination of an alleged discriminatory housing practice."[38] Thus, determining which event triggers the statute of limitations comes down to identifying what constitutes a discriminatory housing practice.[39] The FHA defines a "discriminatory housing practice" as "an

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29. *Id.* § 3604(f)(7).

30. *See id.* §§ 3610, 3613, 3614.

31. *Id.* § 3614(a).

32. *See, e.g.*, Garcia v. Brockway, 526 F.3d 456, 460 (9th Cir.) (en banc), *cert. denied*, 129 S. Ct. 724 (2008).

33. *Id.*

34. *Id.* Injunctive relief for violations of the FHA's design-and-construction provisions includes retrofit orders. Schwemm, *Barriers*, *supra* note 1, at 836. When enforcing its rights, the United States is not subject to the affirmative defense of laches. United States v. Summerlin, 310 U.S. 414, 416 (1940); *see also* United States v. Quality Built Constr., Inc, 309 F. Supp. 2d 756, 761 (E.D.N.C. 2003). Therefore, the possibility always remains that the Attorney General could bring suit to have a noncompliant covered dwelling brought into compliance. Schwemm, *Barriers*, *supra* note 1, at 767-68.

35. 42 U.S.C. § 3610(a)(1)(A)(i) (2006).

36. *Id.* § 3602(i).

37. *Id.* § 3610(a)(1)(A)(i).

38. *Id.* § 3613(a)(1)(A).

39. Though this Note focuses on identifying the discriminatory housing practice in the

act that is unlawful under section 3604 . . . of this title."[40] The courts are divided as to what actions constitute unlawful discriminatory housing practices under the FHA in the design-and-construction context.[41]

C. Legislative History

The legislative history of the Fair Housing Amendments Act provides insight into the legislative intent behind the accessibility requirements.[42] The House Report indicates that the purpose of the design-and-construction provisions was to end the exclusion of individuals with disabilities from mainstream society.[43] Congress deemed the design-and-construction provisions necessary "to avoid future de facto exclusion of persons with handicaps."[44] Congress came to this conclusion "[b]ecause persons with mobility impairments need to be able to get into and around a dwelling unit (or else they are in effect excluded because of their handicap)."[45] Congress believed that the accessibility provisions would remove the barriers individuals with disabilities had encountered in the search for equal housing opportunities.[46]

Additionally, the legislative history reveals a congressional intent to expand enforcement of the FHA by private civil actions.[47] The House Report stated that private enforcement of the FHA had been undermined by a short limitations period and that Congress sought to remedy that deficiency by expanding the limitations period from 180 days to two years.[48] The House Report also indicated that Congress removed previously existing limitations on punitive damages and attorney's fees awards because they created disincentives for private individuals

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context of the private civil action, that determination would also control in administrative proceedings under § 3610(a) because they must be filed within a year of the occurrence or termination of a discriminatory housing practice. *Id.* § 3610(a). On the other hand, there is no explicit requirement that a "discriminatory housing practice" must take place for the Attorney General to bring suit under § 3614. *Id.* § 3614(a).

40. *Id.* § 3602(f).

41. *See, e.g.* Garcia v. Brockway, 526 F.3d 456, 461 (9th Cir.) (en banc), *cert. denied*, 129 S. Ct. 724 (2008) (holding that the conclusion of the design-and-construction phase triggered the statute of limitations); Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc., 210 F. App'x 469, 479-80 (6th Cir. 2006) (unpublished), *cert. denied*, 128 S. Ct. 880 (2008) (holding that the sale or rental of the last nonconforming unit in a development triggered the statute of limitations); Mont. Fair Hous., Inc. v. Am. Capital Dev., Inc., 81 F. Supp. 2d 1057, 1063 (D. Mont. 1999) (holding that bringing the building into compliance with FHA accessibility requirements triggered the statute of limitations).

42. *See* H.R. REP. NO. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173.

43. *Id.* at 18, *reprinted in* 1988 U.S.C.C.A.N. at 2179.

44. *Id.* at 27, *reprinted in* 1988 U.S.C.C.A.N. at 2188.

45. *Id.* at 18, *reprinted in* 1988 U.S.C.C.A.N. at 2179.

46. *Id.* at 27-28, *reprinted in* 1988 U.S.C.C.A.N. at 2188-89.

47. *Id.* at 39-40, *reprinted in* 1988 U.S.C.C.A.N. at 2200-01.

48. *Id.* at 16, 39, *reprinted in* 1988 U.S.C.C.A.N. at 2177, 2200.

wishing to bring suit.[49] These amendments evince the congressional intent to encourage individuals to enforce the FHA by allowing them broader access to the courts.

D. Supreme Court Precedent

When interpreting the FHA, the courts follow several guiding principles initially set forth by the Supreme Court.[50] First, courts have long interpreted the FHA consistently with Title VII precedents.[51] In *Trafficante v. Metropolitan Life Insurance Co.*,[52] the Supreme Court first used judicial interpretation of Title VII as a source of guidance for construing the FHA.[53] In *Trafficante*, the Court quoted a Title VII case holding that the words of the statute indicated a congressional intent to broadly define standing under Title VII.[54] The Court went on to reach the same conclusion with respect to suits brought under the FHA.[55] Numerous lower courts have followed the Supreme Court's example by relying on Title VII precedents to construe the FHA.[56]

Second, in *Trafficante* and many subsequent decisions, the Supreme Court has held that courts should construe the FHA broadly.[57] In *Trafficante*, the Court reasoned that "[t]he language of the Act is broad and inclusive"[58] and that the Court could only give vitality to the important policies behind the FHA by according it "a generous construction."[59] Similarly, in *City of Edmonds v. Oxford House, Inc.*,[60] the Court recognized the FHA's "'broad and inclusive' compass, and therefore accord[ed] a 'generous construction.'"[61]

Finally, in *Trafficante*, the Supreme Court held that HUD's consistent administrative construction of the FHA is "entitled to great weight."[62] HUD is

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49. *Id.* at 40, *reprinted in* 1988 U.S.C.C.A.N. at 2201.

50. *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7.1.

51. *Id.* § 7:4.

52. 409 U.S. 205 (1972).

53. *Id.* at 209.

54. *Id.*

55. *Id.*

56. *See generally* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:4 (citing, inter alia, DiCenso v. Cisneros, 96 F.3d 1004, 1008-09 (7th Cir. 1996) (analyzing hostile environment sex discrimination claims in the FHA context by analogy to Title VII); Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745 n.1 (9th Cir. 1996) (noting that in an FHA familial status discrimination case, "[w]e may look for guidance to employment discrimination cases")).

57. *Trafficante*, 409 U.S. at 211-12; *see also* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995); Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982). *See generally* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:2.

58. *Trafficante*, 409 U.S. at 209.

59. *Id.* at 212.

60. 514 U.S. at 725.

61. *Id.* at 731 (quoting *Trafficante*, 409 U.S. at 209, 212).

62. 409 U.S. at 210.

the agency responsible for administering the FHA.[63] When Congress passed the Fair Housing Amendments Act, it required HUD to issue rules to implement the amended FHA.[64] HUD responded by promulgating a number of regulations[65] and publishing various guidelines and manuals.[66]

The administrative regulations HUD promulgates are entitled to deference under the U.S. Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[67] Under *Chevron*, courts engage in a two-step analysis to determine whether to defer to a government agency's construction of a statute it administers.[68] First, the court will determine whether the language of the statute addresses the issue.[69] If so, the court will not defer to the administrative agency's interpretation.[70] However, if Congress has not addressed the issue or if the statute is ambiguous, the court will proceed to the second step of the analysis, determining whether the agency's interpretation is permissible.[71] If the interpretation is reasonable, courts must give deference.[72] Thus, HUD regulations are entitled to considerable deference.

On the other hand, HUD's interpretations embodied only in guidelines, manuals, and policy statements are not entitled to *Chevron*-style deference.[73] Nevertheless, these interpretations are "entitled to respect" under *Skidmore v.*

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63. 42 U.S.C. § 3608(a) (2006).

64. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 13(b), 102 Stat. 1619, 1636.

65. *See, e.g.* 24 C.F.R. § 100.201 (2008); *id.* § 100.205.

66. *See, e.g.* Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472 (Mar. 6, 1991); Supplement to Fair Housing Accessibility Guidelines, 59 Fed. Reg. 33,362 (June 28, 1994); OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URBAN DEV., FAIR HOUSING ACT DESIGN MANUAL: A MANUAL TO ASSIST DESIGNERS AND BUILDERS IN MEETING THE ACCESSIBILITY REQUIREMENTS OF THE FAIR HOUSING ACT (1998) [hereinafter DESIGN MANUAL]; OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. AND URBAN DEV., TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK 3-5 (1995) [hereinafter COMPLAINT HANDBOOK].

67. 467 U.S. 837 (1984). Administrative interpretations of statutes are entitled to *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in . . . notice-and-comment rulemaking." *Id.* at 227. Congress delegated such authority to HUD when it passed the Fair Housing Amendments Act. Fair Housing Amendments Act, § 13(b), 102 Stat. at 1636 ("[HUD] shall . . . issue rules to implement . . . this Act. The Secretary shall give public notice and opportunity for comment with respect to such rules.").

68. *Chevron*, 467 U.S. at 842.

69. *Id.*

70. *Id.* at 842-43.

71. *Id.*

72. *Id.* at 844.

73. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000).

Swift & Co.[74] Under *Skidmore*, the level of deference courts pay to an administrative interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[75]

II. WAGE DISCRIMINATION UNDER TITLE VII: FROM *LEDBETTER* TO THE LEDBETTER ACT

Title VII makes it "an unlawful employment practice" to "discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin."[76] Under Title VII, before an individual can challenge an unlawful employment practice in court, he or she must first file a charge with the Equal Employment Opportunity Commission (EEOC).[77] If the employee fails to file the charge within the statutory charging period (either 180 or 300 days, depending on the state) after the occurrence of an unlawful employment practice, the employee's claims are time-barred.[78] Therefore, the timeliness of an employee's claim depends on what events constitute unlawful employment practices.[79]

A. Ledbetter v. Goodyear Tire & Rubber Co.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court held in a 5-4 decision that the 180-day charging period for Title VII wage discrimination claims ran from the date the employer made the discriminatory pay-setting decision.[80] The Court rejected the plaintiff's argument that each paycheck she received that was lower due to past sex discrimination constituted a separate, actionable violation of Title VII.[81] The Court reasoned that "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[82]

1. Facts and Procedural History.—Lilly Ledbetter worked as a supervisor

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74. *See id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); *see also* Garcia v. Brockway, 526 F.3d 456, 476 (9th Cir.) (Fisher, J., dissenting), *cert. denied*, 129 S. Ct. 724 (2008).

75. 323 U.S. 134, 140 (1944).

76. 42 U.S.C. § 2000e-2(a)(1) (2006).

77. *Id.* § 2000e-5(e)(1).

78. *Id.*; Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 623-24 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 and 42 U.S.C.).

79. *See Ledbetter*, 550 U.S. at 624 (noting that, when determining whether EEOC charges are timely filed, the Supreme Court has "stressed the need to identify with care the specific employment practice that is at issue").

80. *Id.* at 628.

81. *Id.*

82. *Id.*

at the Gadsden, Alabama Goodyear Tire & Rubber plant in from 1979 to 1998.[83] During most of her nearly twenty years of employment at Goodyear, Ledbetter worked as an area manager, a position occupied mostly by men.[84] When she first began working at Goodyear, Ledbetter's salary was commensurate with that of her male colleagues; however, by the time she took retirement, Ledbetter was being paid significantly less than all of the male employees performing similar work at the plant.[85] Ledbetter made $3,727 per month, while the lowest paid male area manager made $4,286 per month, and the highest paid male area manager made $5,236 per month.[86]

In July 1998, Ledbetter filed a formal EEOC charge alleging that Goodyear had discriminated against her because of her sex.[87] Ledbetter took early retirement in November 1998 and filed a Title VII wage discrimination claim against Goodyear.[88] Ledbetter alleged that over the course of her employment, her supervisors had repeatedly given her poor performance evaluations because she was a woman.[89] As a result of these discriminatory evaluations, Goodyear did not increase her pay to the extent that it would have had her supervisors evaluated her fairly.[90] Moreover, the discriminatory pay decisions continued to affect the pay Ledbetter received throughout her employment and compounded over time.[91]

At trial, Goodyear claimed Ledbetter's evaluations had been nondiscriminatory and that the pay disparity was a result of Ledbetter's poor performance.[92] However, a supervisor admitted Ledbetter had received a "Top Performance Award" in 1996.[93] Ledbetter presented abundant evidence of widespread sex-based discrimination.[94] For example, the jury heard testimony that a supervisor who evaluated Ledbetter "was openly biased against women," and two women who had worked as managers at Goodyear testified that they "were paid less than their male counterparts."[95] In fact, one of the women testified that she was paid less than the men she supervised.[96] Additionally, a supervisor testified that one year, Ledbetter's pay dipped below the established

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83. *Id.* at 643 (Ginsburg, J., dissenting).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 621 (majority opinion).

88. *Id.* at 621-22.

89. *Id.* at 622.

90. *Id.*

91. *Id.* at 649 (Ginsburg, J., dissenting) (noting that "Ledbetter's salary fell 15 to 40 percent behind her male counterparts only after successive evaluations and percentage-based pay adjustments").

92. *Id.* at 659.

93. *Id.*

94. *Id.* at 659-60.

95. *Id.*

96. *Id.* at 660.

minimum amount for her position.[97] Also, Ledbetter testified that not long before she retired, a plant official told her that the "'plant did not need women, that [women] didn't help it, [and] caused problems.'"[98]

The jury found for Ledbetter, and the district court awarded her back pay and damages as well as counsel fees and costs.[99] The Court of Appeals for the Eleventh Circuit reversed, holding that Ledbetter's cause of action was time-barred because the discriminatory pay decisions on which she based her claims took place outside the EEOC charging period.[100]

The Supreme Court granted Ledbetter's petition for certiorari to determine whether Ledbetter could maintain an action for wage discrimination under Title VII based on the disparate pay she received during the EEOC charging period as a result of Goodyear's intentionally discriminatory pay decisions made outside the charging period.[101] Justice Alito authored and Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined the majority opinion affirming the Eleventh Circuit's judgment.[102] Justice Ginsburg authored a vigorous dissent that Justices Stevens, Souter, and Breyer joined.[103]

2. Majority Opinion.—In the majority opinion, Justice Alito first noted that, when determining whether an EEOC charge was timely filed, the Court "ha[s] stressed the need to identify with care the specific employment practice that is at issue."[104] The Court relied on its earlier decision in *National Railroad Passenger Corp. v. Morgan*[105] for the proposition that, when a plaintiff alleges discrete acts of discrimination, such as termination, refusal to hire, and failure to promote, the EEOC charging period begins when the discriminatory act occurs.[106] The Court held that the discriminatory pay-setting decisions were similar discrete acts, and the charging period thus ran from the dates Goodyear made the decisions.[107]

Ledbetter argued that Goodyear's pay-setting decisions were not the only unlawful employment practices at issue.[108] She contended that each paycheck she received during the charging period which was affected by Goodyear's previous discriminatory pay decisions was a separate violation of Title VII.[109] She also argued that Goodyear's decision in 1998 to deny her a raise was an unlawful employment practice because it perpetuated Goodyear's previous

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97. *Id.* at 659.
98. *Id.* at 660 (alterations in original).
99. *Id.* at 644.
100. *Id.* at 622-23 (majority opinion).
101. *Id.* at 623.
102. *Id.* at 620-21.
103. *Id.* at 643 (Ginsburg, J., dissenting).
104. *Id.* at 624 (majority opinion).
105. 536 U.S. 101 (2002).
106. *Ledbetter*, 550 U.S. at 621 (quoting *Morgan*, 536 U.S. at 114).
107. *Id.*
108. *Id.* at 624.
109. *Id.*

intentional discrimination.[110] The Court rejected these arguments, reasoning that they would require it to abandon the fundamental component of a Title VII disparate impact claim, discriminatory intent.[111] According to the Court, because Ledbetter did not claim that Goodyear officials acted with intent to discriminate when they issued the paychecks or when they denied her a raise in 1998, Ledbetter was essentially complaining of the current effects of past discrimination.[112] The Court held that Supreme Court precedent foreclosed Ledbetter's argument,[113] reasoning that "current effects alone cannot breathe life into prior, uncharged discrimination."[114]

3. Dissenting Opinion.—In her dissent, Justice Ginsburg argued that the majority's holding ignored the realities of pay discrimination.[115] Pay disparities are often initially small, so employees may not have reason to suspect their employer has discriminated against them.[116] According to Justice Ginsburg, "[i]t is only when the disparity becomes apparent and sizeable, e.g., through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain."[117] Also, Justice Ginsburg argued that information regarding coworkers' salaries may not be available to employees, noting that employees often keep their salary information private and that employers often refuse to publish employee salary levels and even have rules requiring employees to refrain from discussing their salaries.[118]

Justice Ginsburg argued that each paycheck that perpetuated past discrimination was a fresh instance of unlawful discrimination.[119] Relying on *Morgan*, Justice Ginsburg reasoned that pay discrimination is different from the discrete acts of discrimination identified by the majority.[120] Unlike the one-time, easily identifiable acts of discrimination at issue in the cases the majority cited,[121]

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 625-28 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002); Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107; Del. State Coll. v. Ricks, 449 U.S. 250 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977)).

114. *Id.* at 628.

115. *Id.* at 645 (Ginsburg, J., dissenting).

116. *Id.*

117. *Id.*

118. *Id.* at 649-50.

119. *Id.* at 648.

120. *Id.*

121. *Id.* at 651-52 (citing Lorance v. AT&T Tech., Inc., 490 U.S. 900, 902 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107 (involving the adoption of a discriminatory seniority system); Del. State Coll. v. Ricks, 449 U.S. 250, 252 (1980) (involving a denial of tenure); United Air Lines, Inc. v. Evans, 431 U.S. 553, 554 (1977) (involving a discharge)).

the pay discrimination Ledbetter faced was cumulative and concealed.[122] Therefore, according to Justice Ginsburg, the Court should have concluded that the payment of a wage affected by the discriminatory pay-setting decision constituted an unlawful employment practice.[123]

Finally, Justice Ginsburg argued that the majority's decision was "totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure."[124] She noted that "the ball is in Congress' court" and that the legislature could act to override the decision.[125]

B. Congress's Response: The Lilly Ledbetter Fair Pay Act of 2009

As Justice Ginsburg's dissent adumbrated, Congress reacted to *Ledbetter* by passing a legislative override of the Supreme Court's decision.[126] The Ledbetter Act amends Title VII and provides:

> [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[127]

Thus, the Act does not expand the statute of limitations for wage discrimination claims; rather, it clarifies what events trigger the statute of limitations.

The Act goes on to provide that in addition to any other relief provided, an aggrieved person may recover up to two years of back pay "where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge."[128] By allowing back pay extending for a limited time beyond the charging period, the Act strikes a balance between ensuring that employees have a chance to enforce their Title VII rights and encouraging them to file claims promptly.[129]

The congressional findings included in the Ledbetter Act[130] and the House

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122. *Id.* at 650.

123. *Id.* at 646.

124. *Id.* at 660.

125. *Id.* at 661.

126. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 and 42 U.S.C.).

127. *Id.* § 3, 123 Stat. at 5-6 (to be codified at 42 U.S.C. § 2000e-5(3)(A)).

128. *Id.* § 3, 123 Stat. at 6 (to be codified at 42 U.S.C. § 2000e-5(3)(B)).

129. *See* H.R. REP. NO. 110-237, at 10 (2007).

130. Lilly Ledbetter Fair Pay Act, § 2, 123 Stat. at 5 (to be codified at 42 U.S.C. § 2000e-5 note).

Report accompanying an earlier version of the Ledbetter Act[131] indicate that Congress embraced Justice Ginsburg's dissent. The legislative findings state that *Ledbetter* "significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades."[132] The findings further provide that "[t]he limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended."[133] Like Justice Ginsburg's dissent, the House Report differentiates between discrete discriminatory acts and pay discrimination, indicating that *Ledbetter*'s result is unfair to victims of pay discrimination whose claims may be barred even though the discrimination is ongoing and concealed.[134]

The Ledbetter Act does not apply to Title VII wage discrimination alone.[135] Rather, Congress explicitly extended its provisions to include wage discrimination claims under the Age Discrimination in Employment Act (ADEA),[136] the Americans with Disabilities Act (ADA),[137] and the Rehabilitation Act (RA).[138] Thus, the Ledbetter Act makes it clear that *Ledbetter* is no longer good law with respect to wage discrimination claims under Title VII and certain related statutes. But the Act is silent whether and to what extent *Ledbetter* should continue to influence courts interpreting the FHA.

III. *GARCIA V. BROCKWAY*: *LEDBETTER*'S EFFECT ON FHA DESIGN-AND-CONSTRUCTION SUITS

Garcia is currently the leading case construing the statute of limitations in FHA design-and-construction suits.[139] In the en banc decision, the U.S. Court of Appeals for the Ninth Circuit relied heavily on *Ledbetter* to hold that the completion of construction triggers the statute of limitations in FHA design-and-construction cases.[140] Under the court's holding, the date that a plaintiff actually

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131. H.R. REP. NO. 110-237. The 2007 Act was virtually identical to the 2009 Act. *See id.* at 1-3.

132. Lilly Ledbetter Fair Pay Act, § 2, 123 Stat. at 5 (to be codified at 42 U.S.C. § 2000e-5 note).

133. *Id.*

134. H.R. Rep. No. 110-237, at 6.

135. Lilly Ledbetter Fair Pay Act, § 5, 123 Stat. at 6-7 (to be codified at scattered sections of 29 and 42 U.S.C.).

136. 29 U.S.C. § 621 (2006).

137. 42 U.S.C. § 12111 (2006).

138. 29 U.S.C. § 791 (2006).

139. Currently, the only other circuit court case addressing the statute of limitations issue in Title VII design-and-construction suits is an unpublished decision out of the Sixth Circuit. *See* Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc., 210 Fed. App'x 469 (6th Cir. 2006) (unpublished), *cert. denied*, 128 S. Ct. 880 (2008).

140. Garcia v. Brockway, 526 F.3d 456, 466 (9th Cir.) (en banc), *cert. denied*, 129 S. Ct. 724

becomes aware of the violation and whether a building continues to be noncompliant is irrelevant to the statute of limitations determination. This approach "forever immunizes developers and landlords of FHA-noncompliant buildings from disabled persons' private enforcement actions once two years have passed since the buildings' construction."[141]

A. Facts and Procedural History

The facts of the two cases consolidated on appeal illustrate the problems facing plaintiffs attempting to enforce design-and-construction claims through private civil actions.[142] The first defendant, Brockway, built an apartment complex in Boise, Idaho, and sold the last unit in 1994.[143] The individual plaintiff in that case, Garcia, who used a wheelchair, leased an apartment in the complex in 2001.[144] Garcia found that the apartments did not comply with the FHA design-and-construction requirements, and management ignored his requests for improvements.[145] Garcia filed a private civil action for FHA design-and-construction violations against the builder and the architect within two years of leasing the apartment.[146] The district court granted summary judgment in favor of the defendants, holding that the statute of limitations barred the claim.[147]

In the second consolidated case, Gohres Construction built the North Las Vegas, Nevada Villas at Rancho del Norte in 1997.[148] After Gohres received a final certificate of occupancy, the property was sold in 2001 through foreclosure.[149] In 2004, Thompson, a member of the Disabled Rights Action Committee (DRAC), "tested" the Villas and found violations of the FHA's design-and-construction requirements.[150] Within one year, Thompson and DRAC commenced a suit asserting an FHA design-and-construction claim.[151] The district court granted defendants' motion to dismiss, holding that the claim was

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(2008).

141. *Id.* at 475 (Fisher, J., dissenting).

142. *See id.* at 459 (majority opinion).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 459-60.

148. *Id.* at 460.

149. *Id.*

150. *Id.* "Testers" are individuals who, having no genuine interest in buying or renting a dwelling, pose as potential buyers or renters for the purpose of collecting evidence of unlawful housing practices. Smith v. Pac. Props. & Dev. Corp., 358 F.3d 1097, 1102 (9th Cir. 2004). DRAC initially filed a complaint with HUD in 1997, which HUD dismissed in 2001 because it determined that testers lacked standing. *Garcia*, 526 F.3d at 460. In a later case, the Ninth Circuit held that testers have standing to sue under the FHA. *Id.*

151. *Garcia*, 526 F.3d at 460.

time-barred.[152] In an opinion authored by Chief Judge Alex Kozinski, the Ninth Circuit panel affirmed the district courts' decisions.[153] Judge Raymond Fisher dissented.[154] Subsequently, the Ninth Circuit reheard the case en banc.[155]

B. Majority Opinion

The en banc court adopted the panel decision with only minor changes.[156] Because the statute of limitations runs from the occurrence or termination of a discriminatory housing practice, both the majority and the dissent agreed that identifying the discriminatory housing practice at issue was integral to the decision.[157] The majority held,

> Here, the practice is the "failure to design and construct" a multifamily dwelling according to FHA standards. The statute of limitations is thus triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued. In both cases, this triggering event occurred long before the plaintiffs brought suit.[158]

The plaintiffs argued that the design-and-construction violations were continuing and would not terminate until the defendants remedied the accessibility deficiencies.[159] The court noted that Congress codified the continuing violations doctrine by inserting the word "termination" in § 3613(a)(1)(A).[160] The plaintiffs argued that the word "'termination' would be meaningless" if the court did not read it to mean the termination of the FHA design-and-construction violations.[161] Quoting *Ledbetter*, the court rejected this argument, reasoning that "termination" refers to the termination of a

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152. *Id.*

153. Garcia v. Brockway, 503 F.3d 1092, 1094, 1101 (9th Cir. 2007), *aff'd on reh'g en banc*, 526 F.3d 456 (9th Cir. 2008).

154. *Id.* at 1101 (Fisher, J., dissenting).

155. *Garcia*, 526 F.3d at 456.

156. *Id.* at 459.

157. *Id.* at 462, 468 (Fisher, J., dissenting).

158. *Id.* at 461 (majority opinion) (quoting 42 U.S.C. § 3604(f)(3)(C) (2000)) (footnote and citation omitted).

159. *Id.*

160. *Id.* at 461-62. In *Havens Realty Corp. v. Coleman*, a unanimous Supreme Court held that "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the specified time period, running from] the last asserted occurrence of that practice." 455 U.S. 363, 380-81 (1982). When Congress passed the Fair Housing Amendments Act, Congress indicated that it inserted the word "termination" into the FHA's statute of limitations provisions for the purpose of codifying this holding. H.R. REP. 100-711, at 33 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2194.

161. *Garcia*, 526 F.3d at 462.

discriminatory housing practice and that "[t]he Supreme Court has 'stressed the need to identify with care the specific [discriminatory] practice that is at issue.'"[162] Because the court held that the discriminatory practice at issue was the "'failure to design and construct,' which is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase[,]" it did not qualify as a continuing violation.[163] Instead, the existence of the FHA design-and-construction defects was a continuing effect of a past violation, and the court again quoted *Ledbetter* for the proposition that "'current effects alone cannot breathe life into prior, uncharged discrimination.'"[164]

The court justified its holding on policy grounds.[165] The court stated that a contrary conclusion would impose a severe hardship on builders because it "would provide little finality for developers, who would be required to repurchase and modify (or destroy) buildings containing inaccessible features in order to avoid . . . liability."[166] The court reasoned that by enacting the two-year statute of limitations, Congress indicated a contrary intent.[167]

The court rejected the plaintiffs' two other theories to extend the statute of limitations.[168] First, the plaintiffs argued that the statute of limitations should not begin to run until the injured party *encounters* the defect by visiting the property.[169] Professor Robert G. Schwemm advanced this theory in a recent article.[170] The theory is based on the Supreme Court's guidance that unless the statute contains contrary instructions, courts are to interpret the FHA in accordance with ordinary tort principles.[171] Under ordinary tort principles, the statute of limitations does not begin to run until a plaintiff's claim accrues, which occurs when the defendant's negligent act has harmed the plaintiff.[172] Therefore, in FHA design-and-construction cases, the statute of limitations would not begin to run until the plaintiff personally encountered the accessibility deficiencies because the encounter constitutes the injury.[173] The court rejected Professor Schwemm's theory, reasoning that it "ma[d]e too much" of the Supreme Court's "passing reference to tort law" and that such an approach undercut the language

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162. *Id.* (quoting Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 624 (2007)) (second alteration in original).

163. *Id.* (quoting 42 U.S.C. § 3604(f)(3)(C) (2000)).

164. *Id.* at 463 (quoting *Ledbetter*, 550 U.S. at 628).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 463-66.

169. *Id.* at 465.

170. Schwemm, *Barriers*, *supra* note 1, at 849-55.

171. *See* Meyer v. Holley, 537 U.S. 280, 285-91 (2003); Curtis v. Loether, 415 U.S. 189, 195-96 (1974); Schwemm, *Barriers*, *supra* note 1, at 779.

172. Schwemm, *Barriers*, *supra* note 1, at 850.

173. *Id.*

the FHA's statute of limitations.[174] The court noted, as did Professor Schwemm, that where testers have standing to sue, the theory creates equitable problems with regard to the liability of developers because testers could continually restart the statute of limitations clock simply be revisiting the property.[175]

Additionally, Garcia argued that under the discovery rule and equitable tolling, the statute of limitations should only begin to run when the plaintiff discovers the design-and-construction defect.[176] The discovery rule generally provides that the statute of limitations will not begin to run until the plaintiff knows he has been injured and his injury's cause.[177] Equitable tolling may apply to extend the statute of limitations in cases where the plaintiff knows of his injury but lacks other information necessary to decide whether the injury is caused by another's wrongdoing.[178] The court rejected both of these theories, holding that they would make the clear language of the statute meaningless by indefinitely tolling the limitations period.[179]

C. Dissenting Opinions

Judges Harry Pregerson and Stephen Reinhardt dissented in the en banc decision and also adopted Judge Fisher's panel dissent.[180] Judge Fisher's dissent took a different approach to what the majority called the statute's "clear" language.[181] Judge Fisher argued that by classifying the "failure to design and construct" as the discriminatory housing practice, the majority "commit[ted] a crucial error that underlies the rest of its decision."[182] According to the dissent, the failure to design and construct a covered multifamily dwelling in accordance with the FHA's accessibility requirements is not itself a discriminatory housing practice that can trigger the statute of limitations.[183] Instead, § 3604(f)(3)(C) is merely a definitional provision.[184]

Judge Fisher's approach closely tracks the FHA's statutory language.[185] The analysis began with the statute of limitations provision, which provides that "[a]n *aggrieved person* may commence a civil action . . . not later than 2 years after the occurrence or the termination of an alleged *discriminatory housing practice*."[186] The FHA defines a "discriminatory housing practice," in pertinent part, as "an

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174. *Garcia*, 526 F.3d at 464.
175. *Id.* at 465 (citing Schwemm, *Barriers*, *supra* note 1, at 859).
176. *Id.*
177. *Id.* at 464.
178. *Id.*
179. *Id.* at 466.
180. *Id.* (Pregerson & Reinhardt, JJ., dissenting).
181. *Id.* at 466-67 (Fisher, J., dissenting).
182. *Id.* at 468.
183. *Id.*
184. *Id.* at 470.
185. *See id.* at 468-74.
186. 42 U.S.C. § 3613(a)(1)(A) (2006) (emphasis added).

act that is unlawful under section 3604 . . . of this title."[187] The only relevant actions § 3604 makes *unlawful* are listed as § 3604(f)(1)-(2).[188] These sections make it "unlawful— . . .[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap" and "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap."[189] Section 3604(f)(3)(C) does not provide that failure to design and construct in accordance with the accessibility requirements is *unlawful*; rather, it provides that "[f]or the purposes of this subsection, discrimination includes— . . . failure to design and construct" covered multifamily dwellings in accordance with the accessibility requirements.[190] According to Judge Fisher, § 3604(f)(3)(C) is merely an example of the kind of discrimination that becomes actionable only when it occurs in the context of the sale or rental of a dwelling.[191]

Moreover, the FHA defines an "aggrieved person" as "any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."[192] However, the majority's reading of the statute would in many instances start the clock running long before a building's design-and-construction deficiencies caused anyone to become aggrieved.[193] Accordingly, Judge Fisher maintained that the most logical reading of the FHA's statute of limitations is that it begins to run when a person is injured by one of the actions that § 3604(f) prohibits, which occurs when an individual attempts to buy or rent or tests a unit.[194] Until that point, the building's owner has not committed a discriminatory housing practice, and the disabled individual has not been aggrieved.[195]

Judge Fisher went on to argue that the majority's interpretation conflicted with the legislative history of the FHA and Supreme Court precedent.[196] He noted that the legislative history accompanying the Fair Housing Amendments Act evinced Congress's intent to allow greater access to the courts and encourage private enforcement and that the Supreme Court has approved of these goals by repeatedly holding that courts must construe the FHA flexibly to effectuate its broad remedial purpose.[197] Judge Fisher argued that the majority ignored these instructions by interpreting the statute of limitations in a manner that thwarted

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187. *Id.* § 3602(f) (quoted in *Garcia*, 526 F.3d at 498 (Fisher, J., dissenting)).

188. *Garcia*, 526 F.3d at 468-69 (Fisher, J., dissenting).

189. 42 U.S.C. § 3604(f)(1)-(2) (2006).

190. *Id.* § 3604(f)(3)(C).

191. *Garcia*, 526 F.3d at 470-71 (Fisher, J., dissenting).

192. 42 U.S.C. § 3602(i).

193. *See Garcia*, 526 F.3d at 461 (majority opinion) (holding that the completion of construction triggers the statute of limitations).

194. *Id.* at 469 (Fisher, J., dissenting).

195. *Id.* at 470-71.

196. *Id.* at 475.

197. *Id.*

the FHA's purpose.[198]

Finally, Judge Fisher supported his interpretation with a number of policy arguments. He argued that, under the majority's interpretation, builders would be able to disregard the FHA's accessibility requirements and shield themselves from lawsuits simply by waiting two years before looking for tenants.[199] Judge Fisher also noted that because there is no intent requirement in FHA design-and-construction cases, extending the period for filing suit would not create difficult evidentiary issues; instead, "'defendant's architectural plans and apartment complexes can themselves speak to the alleged construction violations.'"[200] Finally, he reasoned that under his approach, real estate developers and builders would not face such dire consequences as the majority predicted because they are capable of shifting their liability contractually and because a variety of individuals may be named as defendants in FHA design-and-construction suits.[201]

Judges Pregerson and Reinhardt joined Judge Fisher's panel dissent but also dissented separately to "emphasize the extent to which the majority's holding perverts the purpose and intent of the statute."[202] They argued that the majority, to the detriment of disabled individuals, construed the statute of limitations for the sole benefit of the housing construction industry.[203] According to Judges Pregerson and Reinhardt, "[Congress] did not intend to invite the developer to assume the risk of non-compliance, in order to save construction costs, by taking the chance that his violation of the law would remain undiscovered by the disabled community for a period of two years."[204]

IV. *GARCIA*'S SHORTCOMINGS

The majority's decision in *Garcia* severely undermines plaintiffs' ability to enforce their rights under the FHA because the statute of limitations will often expire before any disabled individual becomes aware of the design-and-construction deficiencies.[205] The majority's approach suffers from several shortcomings. First, the majority adheres to an illogical reading of the statutory language.[206] Second, the court's construction conflicts with Supreme Court precedent.[207] Third, the court's reading of the statute conflicts with the legislative purpose behind the FHA.[208] Fourth, the court gives no deference to

198. *Id.*

199. *Id.*

200. *Id.* at 477 (quoting Silver State Fair Hous. Council, Inc. v. ERGS, Inc., 362 F. Supp. 2d 1218, 1222 n.1 (D. Nev. 2005)).

201. *Id.*

202. *Id.* at 466 (Pregerson & Reinhardt, JJ., dissenting).

203. *Id.*

204. *Id.* at 467.

205. *See id.* at 461 (majority opinion).

206. *See id.* at 470-71 (Fisher, J., dissenting).

207. *Id.* at 475.

208. *Id.*

HUD's interpretations.[209] Finally, the court bases much of its decision on unconvincing policy arguments.[210]

A. Statutory Construction

The *Garcia* majority contends that the language of the statute of limitations is "clear."[211] This proposition is difficult to accept given the sharply divergent manners in which courts have interpreted § 3613(a)(1)(A).[212] Although some courts have taken the majority's approach,[213] other courts and commentators have adopted the dissent's reasoning.[214] Still other courts have held that the statute of limitations begins to run only when the building is brought into compliance, reasoning that the failure to design and construct a covered multifamily dwelling in accordance with § 3604(f)(3)(C)'s requirements is a continuing violation.[215] Therefore, the *Garcia* majority's contention that the statute of limitations provision is unambiguous in the context of design-and-construction suits is unconvincing. In reality, the *Garcia* majority "f[ound] an ambiguity in the statute and then resolv[ed] that ambiguity contrary to the overall purpose and structure of the FHA and its legislative and judicial history."[216]

The majority addressed Judge Fisher's convincing statutory construction argument in footnotes, contending that because § 3604(f)(3)(C) is coordinate to §§ 3604(f)(1) and (2), "treating (f)(3)(C) as subordinate makes no structural sense."[217] Although the sections are coordinate, they are framed differently. The introductory language of §§ 3604(f)(1) and (2) provides that "it shall be unlawful" to do the specified acts.[218] On the other hand, § 3604(f)(3)(C)'s introductory language only provides that for the purposes of the subsection, "discrimination includes" the acts listed.[219] The majority gave no support for its

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209. *Id.*

210. *See id.* at 476-78.

211. *Id.* at 466 (majority opinion).

212. *See* cases cited *supra* note 41.

213. *See, e.g.*, United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129, 1141 (D. Idaho 2003); Moseke v. Miller & Smith, Inc., 202 F. Supp. 2d 492, 501 (E.D. Va. 2002).

214. *See, e.g.*, Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc., 210 F. App'x 469, 481 (6th Cir. 2006); Schwemm, *Barriers*, *supra* note 1, at 851.

215. *See, e.g.*, E. Paralyzed Veterans Ass'n, Inc. v. Lazarus-Burman Assocs., 133 F. Supp. 2d 203, 213 (E.D.N.Y. 2001) (Plaintiff "does not complain of a discrete violation of the FHA, but instead describes an unlawful practice that . . . has continued to the present day. As such, [Plaintiff] alleges a continuing violation which, therefore, is timely made."); Montana Fair Hous., Inc. v. Am. Capital Dev., Inc., 81 F. Supp. 2d 1057, 1063 (D. Mont. 1999) (holding that the FHA is "clear" that the statute of limitations did not begin to run until the design-and-construction defects were cured).

216. *Garcia*, 526 F.3d at 467 (Fisher, J., dissenting).

217. *Id.* at 461 n.1 (majority opinion).

218. 42 U.S.C. § 3604 (2006).

219. *Id.* § 3604(f)(3).

perplexing conclusion that the coordinate placement of the sections should control, given the subsections' divergent statutory language.

Instead of pursuing the statutory construction argument, the majority attempted to defend its reading of the statute by resorting to a results-based analysis. The court reasoned that "under the dissent's interpretation, only the party that actually does the selling or renting would be liable, not the party that designed or constructed and FHA-noncompliant unit[.]"[220] However, according to Professor Schwemm, "'any entity who contributes to a violation of the FHAA would be liable.'"[221] Original builders and developers may continue to be liable even after they sell noncompliant units.[222] Furthermore, the majority's holding would protect builders of noncompliant units from private suits even if they retained ownership and control over their buildings.[223]

The majority also argued that the dissent's reading of the statutory language "would make it impossible, or at least more difficult, for the Attorney General to bring a design-and-construction claim against builders under 42 U.S.C. § 3614(a), because design and construction of an FHA-noncompliant building alone would not . . . be actionable under the FHA."[224] A reading of § 3614(a) reveals the court's error: No discriminatory housing practice needs to occur for the Attorney General to file suit against a noncompliant builder.[225] Under § 3614(a), the Attorney General may bring a civil suit when "any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the FHA]" or when "any group of persons has been denied any of the rights granted by [the FHA] and such denial raises an issue of general public importance[.]"[226] Even if construction alone does not amount to a discriminatory housing practice, it would amount to "a pattern or practice of resistance," and the people living in FHA-noncompliant units would be a "group of persons denied rights" under the FHA.[227] The Attorney General could thus file suit immediately when a builder began construction of an FHA-noncompliant dwelling even though the construction alone does not amount to a discriminatory housing practice.

Even if the dissent's reading of the statute did somehow limit the Attorney General's ability to bring suit, the court did not take into consideration the

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220. *Garcia*, 526 F.3d at 461 n.1.

221. Schwemm, *Barriers*, *supra* note 1, at 778 (quoting Baltimore Neighborhoods, Inc. v Rommel Builders, Inc., 3 F. Supp. 2d 661, 665 (D. Md. 1998)).

222. *Id.* at 781-90.

223. Under the majority's approach, all parties are immunized from private suit once two years have passed after the completion of construction. *See Garcia*, 526 F.3d at 461. This is the case regardless of whether the original builder maintains ownership of the property.

224. *Id.* at 461 n.1.

225. 42 U.S.C. § 3614(a) (2006). The plaintiffs in *Garcia* made this argument in their petition for certiorari. Petition for Writ of Certiorari at 13-14, Thompson v. Turk, 129 S. Ct. 724 (2008) (No. 08-140).

226. 42 U.S.C. § 3614(a).

227. Petition for Writ of Certiorari at 13-14, *Thompson*, 129 S. Ct. 724.

relative "importance of private enforcement" of the FHA.[228] In *Trafficante*, the Supreme Court reasoned that "since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits[.]"[229] If a court must choose between limiting either the Attorney General's or private persons' ability to bring suits, the private persons' interests should take priority.

B. Conflict with Supreme Court Precedent

Garcia's holding conflicts with long-standing Supreme Court precedent requiring courts to construe the FHA broadly.[230] Specifically with regard to statutes of limitation, in *Havens Realty Corp. v. Coleman*,[231] a unanimous Supreme Court cautioned that a "wooden application" of the FHA's statute of limitations "only undermines the broad remedial intent of Congress embodied in the Act[.]"[232] In *Garcia*, the Ninth Circuit applied the statute of limitations as rigidly as the ambiguous statutory language would allow, contrary to the Supreme Court's instructions in *Havens*.[233]

C. Conflict with Legislative Purpose

The legislative history of the Fair Housing Amendments Act demonstrates Congress's intent that all new covered multifamily dwellings be accessible to individuals with disabilities.[234] *Garcia* undercuts this purpose by protecting builders from liability for their noncompliance. Immunizing noncompliant parties from suit in all cases two years after they complete construction can only breed contempt for the FHA's accessibility requirements among builders.

The legislative history also indicates that Congress intended to expand individuals' access to the courts in enforcing their FHA rights.[235] Again, *Garcia*'s holding thwarts this purpose by starting the statute of limitations clock running so early that it may expire before any interested individual becomes aware of the design-and-construction deficiencies in a covered multifamily dwelling.

D. No Deference to HUD Manuals

Despite Supreme Court guidance counseling otherwise, the majority in

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228. *Id.* at 14.

229. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972).

230. *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:2.

231. 455 U.S. 363 (1982).

232. *Id.* at 380.

233. *See* Garcia v. Brockway, 526 F.3d 456, 461 (9th Cir.) (en banc), *cert. denied*, 127 S. Ct. 724 (2008).

234. *See* H.R. REP. NO. 100-711, at 18, 27-28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179, 2188-89.

235. *See id.* at 16, 39-40.

Garcia dismisses HUD's interpretations of the statute of limitations.[236] HUD has not promulgated regulations addressing what event triggers the statute of limitations in design-and-construction claims. The agency has, however, spoken to the issue in a manual and a handbook.[237] In its Design Manual, HUD states that with respect to the FHA's design-and-construction requirements, "complaints could be filed at any time that the building continues to be in noncompliance, because the discriminatory housing practice—failure to design and construct the building in compliance—does not terminate."[238] Similarly, in its Complaint Handbook, HUD provides that "[a] complainant aggrieved because an otherwise covered multifamily dwelling unit was not designed and constructed to meet the Fair Housing Accessibility Guidelines, may allege a continuing violation regardless of when construction of the building was completed."[239] Under the applicable *Skidmore* standard, these interpretations are entitled to deference only to the extent that they are persuasive, but the interpretations are "persuasive and dovetail[] with both the statutory text and nontextual considerations."[240]

E. Unconvincing Policy Arguments

Another problem with the majority's opinion in *Garcia* is that it relies on unconvincing policy arguments. For example, the court was concerned that the dissent's more expansive reading of the statute would allow disabled individuals to sue builders and real estate developers who failed to comply with § 3604(f)(3)(C)'s requirements years after they ceased to have any control over the building.[241] This argument is unimpressive for several reasons. First, the majority's approach immunizes builders and developers from suit two years after they complete construction even if they retain ownership of and control over their buildings.[242] Second, it is unclear why courts should be concerned with protecting developers from liability they have incurred due to their own failure to comply with the law. Third, even if protecting builders is a legitimate concern, that interest should not supersede the interests of disabled individuals, for whom the legislation was designed to protect. Fourth, the Fair Housing Amendment Act's legislative history shows that Congress did not share this concern for developers.[243] Finally, developers could seek to protect themselves contractually by requiring purchasers to indemnify them against design-and-

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236. *Garcia*, 526 F.3d at 462.

237. *See* COMPLAINT HANDBOOK, *supra* note 66, at 3-5; DESIGN MANUAL, *supra* note 66, at 22.

238. DESIGN MANUAL, *supra* note 66, at 22.

239. COMPLAINT HANDBOOK, *supra* note 66, at 3-5.

240. *Garcia*, 526 F.3d at 476 (Fisher, J., dissenting).

241. *Id.* at 463 (majority opinion).

242. *See id.* at 477.

243. *See id.* at 476-77 (Fisher, J., dissenting).

construction liability.[244]

The *Garcia* majority was also concerned that the dissent's reading would render the statute of limitations meaningless by tolling it indefinitely.[245] This is simply not true. Under the dissent's approach, plaintiffs' suits would be time-barred two years after they encountered the violations.[246] Even under HUD's more expansive approach, builders would be immune from suit two years after they remedied their design-and-construction violations.[247] In any event, defendants could invoke the equitable doctrine of laches to defend against stale claims.[248]

Moreover, the fundamental policies justifying statutes of limitation are "at a low ebb here."[249] Statutes of limitations serve to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."[250] However, evidentiary issues are not a major concern in design-and-construction cases because liability does not turn on intent.[251] A covered multifamily dwelling either meets the accessibility requirements or it does not.[252] Nor is an interest in preventing plaintiffs who sleep on their rights from bringing stale suits implicated.[253] Here, no one can accuse plaintiffs who are unaware of the design-and-construction violations until they rent or buy a dwelling of impermissible delay.

For the foregoing reasons, the Ninth Circuit's stance in *Garcia* is untenable. Although the court could have possibly reached the same result without relying on *Ledbetter*, it is telling that the majority relies on and quotes from *Ledbetter* much more heavily than any other Supreme Court case.[254] Other courts are also likely to find *Ledbetter* controlling in FHA design-and-construction suits given that courts interpret the FHA in light of Title VII precedents.[255] Therefore, it is necessary to explore to what extent *Ledbetter* continues to be applicable in FHA design-and-construction suits after the Ledbetter Act. Even if *Garcia* is not a direct result of *Ledbetter*, the multiple shortcomings of the Ninth Circuit's approach necessitate a legislative response.

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244. *Id.* at 477.
245. *Id.* at 463 (majority opinion).
246. *Id.* at 476 (Fisher, J., dissenting).
247. *Id.*
248. *See id.* at 470 n.2.
249. *Id.* at 477.
250. United States v. Kubrick, 444 U.S. 111, 117 (1979) (citations omitted).
251. *Garcia*, 526 F.3d at 477 (Fisher, J., dissenting).
252. *Id.*
253. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 256-57 (1980).
254. *Garcia*, 526 F.3d at 462-64 (majority opinion).
255. *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:4.

V. *LEDBETTER*'S CONTINUING APPLICABILITY IN FHA CASES AND THE NEED FOR A CONSISTENT LEGISLATIVE RESPONSE

When Congress overrides precedent, the common assumption may be that courts will no longer rely on the overridden precedent.[256] However, in a recent article, Deborah A. Widiss demonstrated that this is not the case; instead, courts very often construe legislative overrides narrowly and continue to rely on the overridden precedent in other contexts.[257] Widiss calls such overridden precedent "shadow precedents."[258] Because the Ledbetter Act will not prevent courts from applying *Ledbetter* as shadow precedent, Congress should pass a legislative response making it clear that *Ledbetter* no longer applies in FHA design-and-construction suits.

A. Legislative Overrides and Shadow Precedent

Widiss explores the courts' reactions to legislative overrides of several Title VII precedents and the resulting application of shadow precedent.[259] As one example, Widiss cites *Lorance v. AT&T Technologies, Inc.*,[260] where the Supreme Court held that a plaintiff's claim of discrimination under Title VII was time-barred.[261] The plaintiff sued when she was laid off, alleging that the employer had originally adopted its seniority system for a discriminatory purpose.[262] The Court held that the discriminatory act at issue was the adoption of the seniority system and that the plaintiff's claims were untimely because she had not filed within 180 days after the initial adoption of the system.[263]

Congress overrode the decision in the 1991 Civil Rights Act, which provided that an unlawful employment practice occurs when a discriminatory seniority system is adopted, when a person becomes subject to such a system, or when a person is injured by such a system.[264] In the legislative history of the bill, Congress conveyed its disapproval of courts' application of *Lorance* in other contexts.[265] Nevertheless, courts continue to apply *Lorance* "as a shadow precedent."[266] In fact, the Supreme Court relied heavily on *Lorance* and other cases that had cited *Lorance* in *Ledbetter*.[267]

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256. Widiss, *supra* note 15, at 511.

257. *Id.* at 512.

258. *Id.*

259. *Id.* at 536-56.

260. *Id.* at 542 (citing Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107).

261. *Lorance*, 490 at 907-08.

262. *Id.* at 902-03.

263. *Id.* at 907-08.

264. Widiss, *supra* note 15, at 543.

265. *Id.* at 544.

266. *Id.*

267. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 625-26, 627 n.2 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be

As another example of shadow precedent, Widiss cites *Price Waterhouse v. Hopkins*.[268] In *Price Waterhouse*, the Supreme Court held that a defendant in a Title VII action could avoid liability for discrimination by showing that it would have made the same employment decision even if it had not taken into consideration the plaintiff's status as a member of a group protected under Title VII.[269] In the 1991 Civil Rights Act, Congress also overrode this decision by amending Title VII to provide that an unlawful employment practice occurs if the plaintiff's status as a member of a protected class is a motivating factor in an employment decision.[270] Although the statutory language did not address related statutes such as the ADEA and the ADA, the legislative history indicated that courts should interpret laws modeled after Title VII in a consistent manner.[271] Despite Congress's clear repudiation of *Price Waterhouse*, many courts continue to apply its reasoning in ADA and ADEA cases.[272]

As Widiss's analysis makes clear, a congressional override of a Supreme Court case does not preclude courts from continuing to follow its reasoning, even when the legislative history indicates a contrary intent.[273] In fact, some courts have continued to apply shadow precedent even after the Supreme Court declared that a congressional override fully superseded the case.[274] Therefore, it is likely that courts will continue to apply *Ledbetter* as shadow precedent in FHA suits.

B. Ledbetter *as "Shadow Precedent"*

The legislative history of the Ledbetter Act indicates Congress's intent to repudiate not only *Ledbetter*'s specific holding, but also its underlying reasoning.[275] In the House Report, Congress indicated its understanding that *Ledbetter* was incorrect and that the Ledbetter Act merely clarified the law, rather than changing it.[276] According to the House Report, the Ledbetter Act was "designed to rectify . . . the Supreme Court decision in *Ledbetter*" and to "restore prior law."[277] Nevertheless, courts will most likely continue to rely on *Ledbetter*.[278] This is especially true in FHA cases, given the common

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codified in scattered sections of 29 and 42 U.S.C.); Widiss, *supra* note 15, at 544.

268. Widiss, *supra* note 15, at 546 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107).

269. *Hopkins*, 490 U.S. at 258.

270. Widiss, *supra* note 15, at 548.

271. *Id.* at 548-49.

272. *Id.* at 549.

273. *Id.*

274. *Id.* at 552-53 (citing Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076).

275. Kathryn A. Eidmann, Comment, Ledbetter *in Congress: The Limits of a Narrow Legislative Override*, 117 YALE L.J. 971, 976 (2008).

276. *See* H.R. Rep. No. 110-237, at 5-7 (2007).

277. *Id.* at 5-6.

278. *See* Eidmann, *supra* note 275.

understanding that the FHA should be interpreted in light of Title VII.[279]

In the Ledbetter Act, Congress specifically provided that the override should apply to certain related statutes, including the ADEA and the ADA.[280] This suggests that the legislature may have learned from the disagreement among the lower courts over whether the legislative override of *Price Waterhouse* applied to related statutes.[281] But the Ledbetter Act fails to mention the FHA. Courts are likely to reason that Congress's omission was intentional and continue to apply *Ledbetter* in FHA design-and-construction cases.[282]

C. The Solution: A Consistent Legislative Response

Four responses to the statute of limitations issue presented in *Garcia* are available. The first response is not to respond; courts could be left to sort out the issue on their own. Second, HUD could promulgate regulations overriding or modifying *Garcia*'s holding. Third, the Supreme Court could address the issue. Finally, Congress could respond legislatively. For the reasons discussed below, a congressional response is the best alternative to ensure that courts will consistently interpret the statute of limitations in design-and-construction suits according to the legislative intent.

1. Allowing Lower Courts to Develop an Appropriate Response.—One option is to allow the lower courts to sort out the statute of limitations issue. This approach is undesirable because relevant case law demonstrates that the courts are unable to come to a consensus regarding the issue.[283] This uncertainty is unfair to both plaintiffs and defendants because liability depends not on the violation, but on the locale. Moreover, the instability wastes trial courts' scarce resources. Because there is little binding precedent on point,[284] trial courts must reinvent the wheel each time they are confronted with a design-and-construction timeliness issue.

2. HUD Regulations.—Another option is that HUD could promulgate regulations to overturn *Garcia*. As mentioned earlier, HUD regulations are generally entitled to *Chevron* deference.[285] Thus, courts must defer to HUD's administrative regulations to the extent that they are reasonable, as long as they do not violate the statute's plain language.[286] This approach is problematic

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279. *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:4.

280. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, §§ 4-5, 123 Stat. 5, 6 (to be codified at scattered sections of 29 and 42 U.S.C.).

281. *See* Widiss, *supra* note 15, at 549.

282. *See* Eidmann, *supra* note 275, at 974.

283. *See supra* note 41 and accompanying text.

284. *See* Garcia v. Brockway, 526 F.3d 456 (9th Cir.) (en banc), *cert. denied* 129 S. Ct. 724 (2008); Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc., 210 F. App'x 469 (6th Cir. 2006) (unpublished), *cert. denied*, 128 S. Ct. 880 (2008). Because *Village of Olde St. Andrews* is unpublished, it is not binding precedent within the Sixth Circuit. *Id.* at 469.

285. *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:5.

286. *Id.*

because courts following *Garcia*'s reasoning could conclude that the statutory language mandates a contrary result and disregard the regulations.[287] Thus, even if HUD promulgated regulations to settle the statute of limitations question, in reality, these regulations may have little effect.

3. A Supreme Court Decision.—Another way to resolve the confusion around timeliness in FHA design-and-construction suits is a Supreme Court decision. It is unclear whether the Supreme Court would grant certiorari on an FHA design-and-construction case any time soon. Although the Court has denied certiorari in both circuit court cases addressing the issue, those cases have now created a circuit split,[288] which means that future petitions may garner more attention from the Court.

But even if the Supreme Court grants certiorari in a future case, the Court's decision might not reflect the legislative intent behind the FHA. Several commentators have argued that the current Supreme Court has inappropriately weakened the protections of civil rights laws.[289] This proposition finds support in the fact that Congress has recently felt obliged to legislatively override several Supreme Court decisions which constricted the protections of civil rights statutes.[290] Therefore, even though a Supreme Court decision would settle the confusion surrounding FHA design-and-construction claims, it is quite possible that the Court's decision would actually further constrict the FHA's protections.

4. A Consistent Legislative Response.—The final and most desirable option is for Congress to pass a legislative response to *Garcia* consistent with its recent legislative response to *Ledbetter*. A clear congressional pronouncement would settle the confusion among the lower courts and allow plaintiffs and defendants to establish realistic expectations regarding their rights and responsibilities.

A legislative response to *Garcia* similar to the Ledbetter Act is desirable because *Garcia*'s shortcomings are similar to *Ledbetter*'s. Much like *Ledbetter* ignored the realities of wage discrimination,[291] *Garcia* ignores the realities of disability discrimination by starting the statute of limitations clock so early that few disabled individuals will even become aware of the design-and-construction deficiencies until the statute of limitations has already run. Similarly, as *Ledbetter* undermined Title VII's protections by unduly restricting the statute of

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287. *See Garcia*, 526 F.3d at 461, 466 (holding that the statutory language clearly required the statute of limitations to begin running upon the completion of construction).

288. *See id.* at 456; *Vill. of Olde St. Andrews*, 210 F. App'x at 481.

289. *See* Robert G. Schwemm, Cox, Halprin, *and Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 720 (2008); Rochelle Bobroff, *Why We Can't Wait: Reversing the Retreat on Civil Rights: The Early Roberts Court Attacks Congress's Power to Protect Civil Rights*, 30 N.C. CENT. L.J. 231 (2008).

290. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (overriding Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)); ADA Amendments Act of 2008, Pub. L. No 110-325, 122 Stat. 3553 (overriding Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) and Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999)).

291. Lilly Ledbetter Fair Pay Act, § 2, 123 Stat. at 5 (to be codified at 42 U.S.C. § 2000e-5).

limitations,[292] *Garcia* constricts the statute of limitations for, and therefore the rights granted by, the FHA.

A legislative response to *Garcia* would probably meet with less resistance than the Ledbetter Act. Some opponents of the Ledbetter Act argued that it would create serious evidentiary problems for defendants who, to defend against discrimination claims, must be able to explain not only their actions but also their intentions.[293] Employers may not be in a position to present information regarding intent years later, when witnesses may have retired; documents may have been lost; and memories may be hazy.[294] However, intent is not required in FHA design-and-construction cases and these evidentiary concerns do not apply.[295]

To settle the statute of limitations issue for design-and-construction claims, Congress should not expand the FHA's statute of limitations. Rather, the legislature should pass an amendment to the FHA that tracks the language of the Ledbetter Act. The amendment should clarify the definition of "discriminatory housing practice" in § 3602(f).[296] Similar to the Ledbetter Act, Congress should provide that with respect to design-and-construction violations, several events constitute discriminatory housing practices. These events should include the design and construction of a noncompliant dwelling, when a person encounters a noncompliant dwelling, and when a person is injured by the existence of a noncompliant dwelling.[297] This clarification would ensure that courts will interpret the FHA's design-and-construction provisions in a manner consistent with the legislative intent that all new covered multifamily dwellings be constructed in a manner that makes them accessible to individuals with disabilities without rendering the statute of limitations meaningless.[298]

CONCLUSION

Ledbetter's continuing applicability in FHA design-and-construction suits is symptomatic of a larger issue. It is accepted that courts should construe the FHA

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292. *Id.*

293. *Impact of Ledbetter Decision on Enforcement of Civil Rights Laws: Hearing on 2831 Before the Subcomm. on the Constitution, Civil Rights, And Civil Liberties and the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Neal D. Mollen, Chair, Washington, D.C. Employment Law Department, Paul, Hastings, Janofsky & Walker LLP).

294. *Id.*

295. Garcia v. Brockway, 526 F.3d 456, 477 (9th Cir.) (Fisher, J., dissenting), *cert. denied*, 129 S. Ct. 724 (2008).

296. 42 U.S.C. § 3602(f) (2006).

297. In *Garcia*, the court noted that adopting Professor Schwemm's encounter theory would give rise to equitable issues because testers could always restart the limitations clock by revisiting the property. 526 F.3d at 465. Congress could address this issue by requiring the statute of limitations to run from the date of the first encounter or by limiting tester standing.

298. *See* H.R. Rep. No. 100-711, at 18, 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179, 2184.

with reference to Title VII precedents.[299] However, Congress has not taken the FHA into consideration when passing narrow legislative overrides of Title VII precedent.[300] When Congress fails to address the FHA in its legislative overrides, courts may interpret the legislative silence as approval of the courts' continued application of harmful precedent.[301] Once again, "the ball is in Congress's court."[302] The Ledbetter Act fails to mention the FHA, and courts are likely to continue to apply *Ledbetter* to narrowly construe the statute of limitations in design-and-construction cases. A legislative solution is necessary to rectify *Ledbetter*'s harmful effects on the civil rights protections Congress created in the FHA for individuals with disabilities.

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299. SCHWEMM, HOUSING DISCRIMINATION, *supra* note 7, § 7:4.

300. *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (to be codified in scattered sections of 29 and 42 U.S.C.).

301. *See* Eidmann, *supra* note 275, at 974.

302. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act, 123 Stat. 5.

YOU SHALL ALWAYS BE MY CHILD: THE DUE PROCESS IMPLICATIONS OF PATERNITY AFFIDAVITS UNDER INDIANA CODE SECTION 16-37-2-2.1

KAYLA BRITTON*

INTRODUCTION

The phone rang. From hundreds of miles away, Jason[1] learned that he was going to be a father. Kendra was born a few months later, and Jason's life changed forever. This father and daughter share a special bond, one that no law should sever.

Jason is one of the lucky ones. Many unwed fathers will never know their children. Indiana denies all fathers who do not marry the mother, or execute a paternity affidavit, the protections of legal paternity.[2] Whether the father knew of the pregnancy or attempted to have contact during or shortly after the pregnancy is immaterial.[3] His failure to act, regardless of whether he knew he had a duty to act, serves as an implied waiver of his interest in his child.[4] The law shows no sympathy for the plight of many unwed fathers.

Indiana denies nonmarital fathers fundamental due process rights. Indiana's paternity laws ensnare some unwitting fathers into assuming paternity of children without full disclosure of what they are signing.[5] Worse still, Indiana denies many unwed fathers the opportunity to ever develop a relationship with their children because those fathers never learn the mother was pregnant.[6] Speedy determination of paternity cannot justify such a high cost. With approximately forty percent of births occurring outside of marriage,[7] Indiana urgently needs to

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1. Names have been changed, but the depicted story is true.

2. *See* IND. CODE §§ 31-14-7-1, -2-1 (2008).

3. *See In re* Paternity of Baby Doe, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000) (placing the burden on the putative father to inquire about pregnancy or risk forfeiture of right to object to the adoption).

4. *See, e.g.*, IND. CODE § 31-19-9-15(a) (2008) (noting that the "father's consent to adoption . . . is irrevocably implied" if he fails to file a paternity action).

5. *See, e.g.*, *In re* Paternity of M.M., 889 N.E.2d 846, 849 n.1 (Ind. Ct. App. 2008).

6. *See, e.g.*, *In re Paternity of Baby Doe*, 734 N.E.2d at 287.

7. PUB. HEALTH SYS. DEV. & DATA COMM'N, DATA ANALYSIS TEAM, IND. STATE DEP'T OF HEALTH, INDIANA NATALITY REPORT—2006, tbl. 25 (2008), http://www.in.gov/isdh/reports/natality/2006/tbl25a.htm (showing that Indiana's birth rate among unmarried women was 41.2% in 2006); *see* BRADY E. HAMILTON ET AL., CTR. FOR DISEASE CONTROL, NATIONAL VITAL

reexamine the state's approach to paternity determinations.

Indiana must approach paternity in a new way, and this Note offers new framework to that effect. This Note references three different categories of men in discussing this sensitive issue. "Biological fathers" are men who are biologically related to the child in question. "Legal fathers" are men who have completed a paternity affidavit,[8] but may not be biological fathers. "Putative fathers" are potential fathers.[9]

Part I of this Note provides an overview of the legal developments for unwed fathers and specifically focuses on how the U.S. Supreme Court has defined the rights of the unwed father. Part II describes the social and legal background in which Indiana's paternity law has developed. Part III outlines Indiana's approach to voluntary acknowledgement of paternity and Indiana's public policy regarding nonmarital children. Part IV explores the constitutional problems with Indiana's treatment of unwed fathers. Part V proposes a new framework for Indiana's approach to paternity, including increased notice prior to execution of the paternity affidavit and encouragement of genetic testing, legal recognition of dual paternity, and enhanced putative father registries.

I. THE EVOLUTION OF THE RIGHTS OF UNWED FATHERS

Under the common law, "an illegitimate child is *filius nullius* [the son of nobody[10]], and can have no father known to the law."[11] The law denied illegitimate children many rights available to marital children, such as the rights to inherit, to receive support from the father, and to bring certain tort actions.[12] The U.S. Supreme Court has since rejected blanket discriminations against nonmarital children.[13] Nevertheless, public policy still generally disfavors illegitimacy.[14]

STATISTICS REPORT 4 (2007), http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_07.pdf (indicating that the national birth rate for unmarried women was 38.5% in 2006).

8. *See* discussion *infra* Part III.

9. Indiana defines a putative father as a man who is neither the presumed biological father nor the legal father. IND. CODE § 31-9-2-100 (2008).

10. *In re* Paternity of E.M.L.G., 863 N.E.2d 867, 870 (Ind. Ct. App. 2007) (citing *In re* Paternity of H.J.B., 829 N.E.2d 157, 160 (Ind. Ct. App. 2005)).

11. Lessee of Brewer v. Blougher, 39 U.S. 178, 198 (1840).

12. Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of* Michael H. v. Gerald D., 65 TUL. L. REV. 585, 588 (1991).

13. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973) ("[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) (holding that Louisiana may not deny equal recovery from workmen's compensation claims for illegitimate children); Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (holding that denying recovery for the mother's wrongful death based solely on the child's illegitimacy is invidious discrimination in violation of the Equal Protection Clause).

14. *See In re Paternity of E.M.L.G.*, 863 N.E.2d at 869.

Although the Supreme Court rejected the unequal treatment of nonmarital children under the U.S. Constitution, it has hesitated to extend such protection to the unwed fathers.[15] On several occasions, the Court has addressed the nature of an unwed father's interest in his child.[16] The unanswered questions left by its opinions indicate the Court's unwillingness to define the precise interest an unwed father has in his child.[17] The states retain the discretion to define a nonmarital father's interest in his child.[18]

A. 1972: Stanley v. Illinois[19]

Joan and Peter Stanley lived together intermittently as unwed romantic partners for eighteen years and had three children together.[20] When Joan died, Illinois took the children into custody.[21] Under state law, nonmarital children became wards of the state if the mother died.[22] Whether Peter was unfit to be a father was irrelevant under the statute.[23] He was unfit simply because he had never married the mother.[24]

Peter challenged the statute under the Equal Protection Clause of the Fourteenth Amendment.[25] The State presumed that all married fathers were fit, but all unmarried fathers were unfit.[26] The Court held that this type of "procedure by presumption" violated Peter's due process rights.[27] As a matter of due process, he was entitled to a fitness hearing before he lost custody of his children.[28] Denying a hearing for unmarried fathers while allowing for a hearing for all other parents who risk losing custody of their children violated the Equal Protection Clause.[29]

The Court emphasized the strong interest a parent has in the child that he has "sired and raised."[30] The decision also displays the Court's discomfort with "procedure by presumption," noting that when "the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present

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15. *See infra* Parts I.A-E.

16. *See infra* Parts I.A-E.

17. *See infra* Parts I.A-E.

18. Rebeca Aizpuru, Note, *Protecting the Unwed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 708 (1999).

19. 405 U.S. 645 (1972).

20. *Id.* at 646.

21. *Id.*

22. *Id.*

23. *Id.* at 647.

24. *Id.* at 646-47.

25. *Id.* at 647.

26. *Id.*

27. *Id.* at 656-57.

28. *Id.* at 658.

29. *Id.*

30. *Id.* at 651.

realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child."[31] State convenience or the government's interest in "prompt efficacious procedures"[32] was insufficient to overcome Peter's "substantial"[33] interest in the custody of his children.[34]

B. 1978: Quilloin v. Walcott[35]

Randall Walcott wanted to adopt his stepson, a nonmarital child.[36] Randall had lived with his stepson for seven years.[37] The biological father, Leon Quilloin, never sought custody or legitimated the child and "had provided support only on an irregular basis."[38] The child was eleven years old when Randall filed the adoption petition,[39] and the child expressed his desire for Randall to adopt him.[40] The child also wanted to continue visitation with his biological father after the adoption.[41] He had visited his biological father "on 'many occasions,'" but the mother concluded that the visits were having a negative impact on her family,[42] including her younger son.[43]

Georgia statutorily provided only the mother of the nonmarital child with the right to veto an adoption, unless the biological father legitimates the child.[44] The mother, in this case, consented to Randall's adoption of her son.[45] Leon subsequently filed an objection to the adoption proceeding and a petition for legitimation.[46]

The trial court ruled that the adoption was in the child's best interests.[47] The court never ruled that Leon was unfit, but it did determine that neither legitimation nor visitation rights were in the best interests of the child.[48] The Georgia Supreme Court affirmed the trial court relying on "the strong state policy of rearing children in a family setting, a policy which . . . might be thwarted if

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31. *Id.* at 656-57.
32. *Id.* at 656.
33. *Id.* at 652.
34. *See id.* at 656-57.
35. 434 U.S. 246 (1978).
36. *Id.* at 247.
37. *See id.*
38. *Id.* at 251.
39. *Id.* at 249.
40. *Id.* at 251.
41. *Id.* at 251 n.11.
42. *Id.* at 251.
43. *Id.* at 251 n.10.
44. *Id.* at 248-49 (citations omitted).
45. *Id.* at 247.
46. *Id.* at 249-50.
47. *Id.* at 251.
48. *Id.*

unwed fathers were required to consent to adoptions."[49]

The U.S. Supreme Court found that the best interests of the child standard adequately protected Leon's interests.[50] The adoption would "give full recognition to a family unit already in existence, a result desired by all concerned, except [Leon]."[51] The Court ignored the child's desire to have continued visitation with Leon because the state adoption statute required full termination of the biological father's rights.[52]

Randall and the mother contended that the procedure did not violate Leon's due process rights because "any constitutionally protected interest appellant might have had was lost by his failure to petition for legitimation during the [eleven] years prior to [the] filing of Randall Walcott's adoption petition."[53] The Court was wary of resting its decision on that assertion because Leon was not aware of the legitimation process until after Randall filed his adoption petition.[54]

The Court also noted that the states could grant an unwed father "less veto authority" than a married father.[55] The dispositive factor for the Court was the unwed father's level of "commitment to the welfare of the child."[56] Leon had never taken full responsibility for the daily care of his child,[57] but Randall had been an active, custodial father for nine years.[58]

Quilloin v. Walcott is a landmark case because it is the first time the Court suggested that "a biological connection alone is insufficient to obtain full, constitutionally protected, parental rights."[59] This suggestion is troubling because the Court ignored the conflicting desire of the child to visit his biological father and the desire of the mother to restrict Leon's access to his child. Leon's restricted access denied him the opportunity to establish the type of relationship the Court was willing to protect. It is also unreasonable to compare a stepfather who has custody of the child by virtue of his marriage to the mother to an unmarried, noncustodial father who does not reside with the mother. The unmarried father cannot become part of the existing family unit, and the Court seemingly punishes him for a situation he cannot realistically rectify.

C. 1979: Caban v. Mohammed[60]

Abdiel Caban and Maria Mohammed never married, cohabited for five years,

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49. *Id.* at 252.
50. *Id.* at 254.
51. *Id.* at 255.
52. *Id.* at 251 n.11.
53. *Id.* at 254.
54. *Id.*
55. *Id.* at 256.
56. *See id.*
57. *Id.*
58. *See id.* at 247, 251.
59. Kisthardt, *supra* note 12, at 600.
60. 441 U.S. 380 (1979).

and had two children together.[61] After the couple split, Maria married Kazin Mohammed. Maria's mother, Delores, took the two children with her to Puerto Rico, where Maria and Kazin planned to move.[62] Abdiel remained in contact with the children while they were in Puerto Rico.[63] One year later, Abdiel went to Puerto Rico to visit the children.[64] The grandmother let him take the children for a few days, but he returned with them to New York.[65] Maria learned that the children were in Abdiel's custody, and she enlisted the help of the police to get the children back.[66] Maria then instituted custody proceedings and the court granted her temporary custody.[67] Abdiel received visitation rights.[68] Maria and Kazin filed an adoption proceeding, and Abdiel cross-petitioned for adoption.[69]

Under the New York adoption statute, an unwed mother may block the adoption of her child "simply by withholding [her] consent."[70] To prevent the termination of his parental rights, an unwed father must establish that the adoption of his biological child would not be in the best interests of the child.[71] Abdiel alleged that this statutory scheme violated his equal protection and due process rights.[72]

The trial court granted Kazin's adoption petition, terminating Abdiel's parental rights.[73] The appellate court affirmed, and Abdiel appealed to the U.S. Supreme Court.[74] The Court held that the New York's statute's "distinction . . . between unmarried mothers and unmarried fathers . . . does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children."[75] The Court's holding seemed to be limited to established parent-child relationships in which the mother and father are similarly situated in the degree of their relationship with the child.[76]

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61. *Id.* at 382.
62. *Id.*
63. *Id.* at 383.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 385-86.
71. *Id.* at 386-87.
72. *Id.* at 384.
73. *Id.* at 383-84.
74. *Id.* at 384-85.
75. *Id.* at 391.
76. *See id.* at 389.

D. 1983: Lehr v. Robertson[77]

Jessica was born out of wedlock in November 1976.[78] Her mother married Richard Robertson eight months after her birth.[79] In December 1978, Jessica's stepfather filed an adoption petition.[80] One month later, Jessica's biological father, Jonathon Lehr, filed for a determination of paternity, support order, and visitation rights.[81] The Robertsons filed for a change of venue, and Lehr first received notice of the pending adoption proceeding when he received the motion for change of venue.[82]

New York law required that certain classes of putative fathers receive notice of a pending adoption proceeding:

> [T]he persons whose names are listed on the putative father registry, . . . those who have been adjudicated to be the father, those who have been identified as the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old.[83]

Lehr did not fit into any of these categories.[84] He lived with Jessica's mother prior to Jessica's birth and visited her in the hospital after the birth.[85] However, his name did not appear on her birth certificate, and he never filed with the state putative father registry.[86] As a result, he never received notice of the adoption proceeding.[87] Knowing of the pending paternity determination action, the judge granted the stepfather's adoption petition.[88]

Lehr moved to vacate the adoption order.[89] The Ulster County Family Court denied his motion and found that it did not have to give him notice of the adoption.[90] The Appellate Division of the Supreme Court held that Lehr's paternity action did not give him the right to receive notice of the adoption, and the notice provisions of the New York statute were constitutional.[91] The New

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77. 463 U.S. 248 (1983).
78. *Id.* at 250.
79. *Id.*
80. *Id.*
81. *Id.* at 252.
82. *Id.* at 252-53.
83. *Id.* at 251.
84. *Id.* at 251-52.
85. *Id.* at 252.
86. *Id.* at 251-52.
87. *See id.* at 253.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 253-54 (citing *In re* Adoption of Jessica "XX," 434 N.Y.S.2d 772 (App. Div.

York Court of Appeals acknowledged that "it might have been prudent to give notice," but it nevertheless concluded that the trial court had not abused its discretion by granting the adoption petition without giving Lehr notice.[92]

Lehr appealed to the U.S. Supreme Court on due process and equal protection grounds.[93] The Court emphasized that when a nonmarital father participates in his child's life and assumes the responsibilities of fatherhood, then the parent-child relationship "acquires substantial protection under the Due Process Clause."[94] A biological link alone, the Court recognized, is not enough to acquire constitutional protection.[95] The Court did not completely disregard the significance of a biological connection:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.[96]

The Court suggested that the ideal scenario is for the biological father to assume parental responsibilities, as opposed to any other man willing to assume the responsibilities.

The Court rejected Lehr's due process claim because he had not assumed parental responsibilities,[97] and his right to receive notice was fully within his control.[98] New York had adequately protected his interest in forming a relationship with Jessica by allowing him to register as a putative father.[99] The Court found irrelevant Lehr's possible lack of knowledge of the putative father registry.[100]

The Court also found that the statute satisfied the Equal Protection Clause because the mother and father were not "similarly situated with regard to their relationship with the child."[101] Jessica's mother established a full parental relationship with her child, while Lehr had not.[102] Therefore, New York could

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1980)).

92. *Id.* at 254-55 (citing *In re* Adoption of Jessica "XX," 430 N.E.2d 896 (N.Y. 1981)).
93. *Id.* at 255.
94. *Id.* at 261.
95. *Id.*
96. *Id.* at 262.
97. *Id.*
98. *Id.* at 263-64.
99. *Id.* at 262-64.
100. *Id.* at 264.
101. *Id.* at 267.
102. *Id.*

treat the two parents differently.[103]

The different views of the majority and the dissent of three Justices illustrate the divergence of opinions that has developed over the last four decades with regard to the rights of unwed fathers. Justice White described the "'nature of the interest' at stake . . . is the interest that a natural parent has in his or her child, one that has long been recognized and accorded constitutional protection."[104] In this view, the biological relationship alone creates the liberty interest.[105] The degree of development in the parent-child relationship relates to the weight of the interest, not whether the interest is cognizable.[106] Because the State did not provide the putative father adequate notice, the State deprived Lehr due process of law, according to Justice White.[107]

The dissent also noted that Lehr alleged a different version of the facts. According to Lehr, the mother concealed her location from him after the child's birth, and she refused his financial support of the child.[108] The mother also threatened to have Lehr arrested if he tried to visit his daughter.[109] Justice White contended that based on the lack of a developed factual record, the Court must assume that Lehr would have had "the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections" if it were not for the actions of the mother.[110] The majority denied Lehr full constitutional protection as a result of a situation that was largely out of his control.

E. 1989: Michael H. v. Gerald D.[111]

Victoria was born of an "adulterous affair."[112] Carole, her mother, was married to Gerald, but Victoria's biological father was Michael.[113] At different points during the first three years of Victoria's life, both men held her out as their child.[114] After Carole's presumably permanent reconciliation with Gerald, Michael and Victoria, through a guardian ad litem, sued for visitation.[115] Gerald moved for summary judgment because California state law provided that a married woman's child was presumptively her husband's, as long as the couple

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103. *Id.* at 267-68.
104. *Id.* at 270 (White, J., dissenting).
105. *Id.* at 272.
106. *Id.*
107. *Id.* at 276.
108. *Id.* at 269.
109. *Id.*
110. *Id.* at 271.
111. 491 U.S. 110 (1989).
112. *Id.* at 113.
113. *Id.* at 113-14.
114. *Id.* at 114-15.
115. *Id.* at 115.

was cohabitating, and the husband was not impotent or sterile.[116]

The state courts denied relief for Michael and Victoria, and they appealed to the U.S. Supreme Court.[117] The Court denied Michael's claim of procedural and substantive due process violations.[118] First, the Court found that the presumption within the state law did not violate procedural due process.[119] Second, Michael did not have a substantive due process claim because his asserted liberty interest was not "rooted in history and tradition."[120] According to the majority, relationships like Michael and Victoria's have not been treated as a "protected family unit."[121] History has favored the "marital family."[122]

The Court rejected Victoria's claims of due process and equal protection violations. Her due process claim "is the obverse of Michael's and fails for the same reasons."[123] Victoria contended that her equal protection claim should receive strict scrutiny because the state statute discriminates against her because of her illegitimacy.[124] The Court refused to apply strict scrutiny because Victoria is not legally illegitimate.[125] Under rational basis review, Victoria's claim failed because the state interest in enacting the statute was to preserve marital families, and allowing unwed fathers to interfere would disrupt the family.[126] The Court found that the statute was rationally related to legitimate governmental interests, and it therefore denied Victoria's equal protection claim.[127]

In dissent, Justice Brennan argued that the plurality should not rely on history and tradition to determine whether the Constitution protects a liberty interest.[128] The dissent argued that the Constitution should have the ability to adapt to changing social mores:

> We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own [idiosyncrasies]. . . . The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that

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116. *Id.*
117. *Id.* at 115-17.
118. *Id.* at 121, 127.
119. *Id.* at 121.
120. *Id.* at 123.
121. *Id.* at 124.
122. *Id.*
123. *Id.* at 131.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 131-32.
128. *Id.* at 136-41 (Brennan, J., dissenting).

sometimes a practice or rule outlives its foundations.[129]

The liberty interest involved in this case is the parent-child relationship.[130] The Court already recognized that this interest must receive constitutional protection.[131] The Court previously prevented any state "from denying important interests or statuses to those whose situations do not fit the government's narrow view of the family."[132]

Justice White's dissenting opinion noted that the State's interest in preventing illegitimacy was no longer relevant.[133] Blood tests can provide proof of paternity, and fathers like Michael are not trying to repudiate fatherly responsibilities.[134] It is relatively commonplace for children to live apart from their biological father but continue to maintain a relationship with him.[135]

Justice White also noted the disconnect between the plurality's holding and *Lehr v. Robertson*.[136] In *Lehr*, the Court required that an unwed father must "grasp" the opportunity to develop a relationship with his child to have a constitutionally protected interest.[137] Michael did exactly that, yet the plurality refused to recognize his interest in a relationship with his daughter.[138] The result rendered Michael "a stranger to his child."[139]

II. "DEADBEAT DAD": THE SCARLET LETTER[140] OF THE MODERN UNWED FATHER

> "Speak, woman!" said another voice, coldly and sternly, proceeding from the crowd about the scaffold. "Speak; and give your child a father!"
>
> "I will not speak!" answered Hester, turning pale as death, but responding to this voice, which she too surely recognized. "And my child must seek a heavenly Father; she shall never know an earthly one!"[141]

Scholars generally regard Hester Prynne as a courageous heroine, while many

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129. *Id.* at 141.

130. *Id.* at 141-42.

131. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

132. *Id.* at 145 (citing Moore v. E. Cleveland, 431 U.S. 494 (1977); Gomez v. Perez, 409 U.S. 535 (1973); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Loving v. Virginia, 388 U.S. 1 (1967)).

133. *Id.* at 161-62 (White, J., dissenting).

134. *Id.*

135. *Id.* at 162.

136. *Id.* at 163.

137. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

138. *Michael H.*, 491 U.S. at 163 (White, J., dissenting).

139. *Id.*

140. *See* NATHANIEL HAWTHORNE, THE SCARLET LETTER (Penguin Books 2003) (1850).

141. *Id.* at 63.

think of her lover, Dimmesdale, as the weak, egotistical father, who selfishly refuses to confess his sins and support his child and her mother.[142] He is an unsympathetic character, and readers generally feel little sorrow upon his death.[143]

In modern society, Dimmesdale is the character who would wear the letter of shame. Rather than a scarlet "A," he would bear the stigmatized label "Deadbeat Dad."[144] He would likely receive even less sympathy in current American society than he did in seventeenth-century Puritanical Boston.

Modern society recognizes two types of deadbeat dads. The first category is the father who does not pay his child support.[145] The second category is the unwed father who never establishes his paternity.[146] Although fathers who choose to abandon their families or refuse to support their children likely deserve little sympathy, many fathers may appear to fit into the definitions of deadbeat dad without even knowing of the child's birth.[147]

Public focus with regard to deadbeat dads has been on stigmatizing those men and reducing the government's financial burden of caring for the single mothers and their children.[148] The legislative focus has similarly been on reducing welfare costs.[149] Chapter 7, Title IV, Part D of the Social Security Act ("Title IV-D") established a child support enforcement program as part of welfare reform.[150] The goal of Title IV-D is to improve the effectiveness of child support programs, with paternity determinations as its primary means of accomplishment.[151]

The states must comply with the legislative goals of Title IV-D in exchange for federal funding.[152] In addition to the appropriations provided to states for Title IV-D enforcement,[153] states also receive "incentive payments" based on the

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142. *See, e.g.*, NINA BAYM, *Introduction* to NATHANIEL HAWTHORNE, THE SCARLET LETTER, at vii, xviii-xx (Penguin Books 2003) (1850).

143. *Id.* at xx.

144. *See* William J. Doherty et al., *Responsible Fathering: An Overview and Conceptual Framework*, 60 J. MARRIAGE AND FAM. 277, 279 (1998) (describing the moral undertone of the term "deadbeat dad").

145. *See* Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1123-24 (1999) ("The villain in the child support reform story is the 'deadbeat dad' who does not pay child support. . . . Americans today conceptualize child support in terms of preventing dependency and in terms of punishing those who 'cause' dependency.").

146. *See* Doherty et al., *supra* note 144, at 279 (noting that "[d]eclaring legal paternity is the sine qua non of responsible fathering").

147. *See supra* notes 3-4 and accompanying text.

148. *See* Hansen, *supra* note 145, at 1123-24.

149. *See id.*

150. 42 U.S.C. § 666 (2006).

151. *Id.* § 651; *see* Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 486 (2005).

152. Cacioppo, *supra* note 151, at 486.

153. *See* 42 U.S.C. § 651 (2006).

state's performance pursuant to Title IV-D's goals.[154] Specifically, Title IV-D bases the state's incentive payments on its paternity establishment, support order, current payment, arrearage payment, and cost-effectiveness performance levels.[155]

Under Title IV-D, states must establish "[e]xpedited administrative and judicial procedures . . . for establishing paternity and for establishing, modifying, and enforcing support obligations."[156] States must also establish procedures for voluntary paternity acknowledgement.[157] The voluntary paternity acknowledgement procedures in each state must include a "simple civil process" in which the mother and father can sign an acknowledgement of paternity as long as they receive notice "of the alternatives to, the legal consequences of, and the rights . . . and responsibilities that arise from, signing the acknowledgement."[158] The states must also establish a "hospital-based program . . . focusing on the period immediately before or after the birth of a child."[159]

The voluntary acknowledgement of paternity is a "legal finding of paternity."[160] The signor may only rescind the acknowledgment "within the earlier of – (I) 60 days; or (II) the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party."[161] After the sixty-day period, the signor may challenge the acknowledgement only on the basis of "fraud, duress, or material mistake of fact."[162] Title IV-D therefore provides a non-judicial, cost-effective means to "receive a final paternity judgment."[163]

III. INDIANA'S TREATMENT OF UNWED FATHERS

Indiana has gone further than Title IV-D mandates. In the gap between Indiana's current procedures and the mandates of Title IV-D lurk problems under the U.S. Constitution. To see the constitutional issues under Indiana law, one must first understand the procedures used in Indiana.

A. Indiana's Public Policy

In accordance with Title IV-D, Indiana has a public policy for establishing paternity of nonmarital children.[164] Indiana law emphasizes identifying the "correct" father in paternity determinations, which shows the importance of a

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154. *Id.* § 658a.
155. *Id.* § 658a(b)(4)(A)-(E).
156. *Id.* § 666(a)(2).
157. *Id.* § 666(a)(5)(C).
158. *Id.* § 666(a)(5)(C)(i).
159. *Id.* § 666(a)(5)(C)(ii).
160. *Id.* § 666(a)(5)(D)(ii).
161. *Id.*
162. *Id.* § 666(a)(5)(D)(iii).
163. *See* Cacioppo, *supra* note 151, at 486.
164. *See In re* Paternity of E.M.L.G., 863 N.E.2d 867, 869 (Ind. Ct. App. 2007) (quoting IND. CODE § 31-14-1-1 (1998)).

biological relationship in Indiana.[165] The Indiana Supreme Court recognized a "substantial public policy in correctly identifying parents and their offspring."[166] Indiana also "disfavors a support order against a man who is not the child's father."[167]

Indiana's paternity establishment statutory scheme also illustrates the state's preference for the biological father's assumption of parental obligations.[168] The statute provides that the mother and "a man who reasonably appears to be the child's biological father" may execute the paternity affidavit at the hospital.[169] The affidavit also includes a sworn statement by the mother that the man signing the affidavit is the child's biological father,[170] and the man must declare within the affidavit that he believes he is the biological father.[171]

B. The Result of Executing a Paternity Affidavit

A paternity affidavit "conclusively establishes the man as the legal father,"[172] making it equivalent to a paternity determination by a court.[173] The mother or the Title IV-D agency may seek child support from the father based solely on the affidavit.[174] The affidavit also provides that "there will be no hearing related to the paternity of the child(ren) included in the affidavit."[175]

C. Valid Revocation of a Paternity Affidavit

The statute strictly limits the revocation of a paternity affidavit.[176] Beyond

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165. *In re* Paternity of S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992).

166. *Id.*; *see In re* Paternity of Davis, 862 N.E.2d 308, 313 (Ind. Ct. App. 2007) (noting the "strong public policies in favor of identifying the correct biological father and allocating the child support obligation to that person").

167. *In re Paternity of S.R.I.*, 602 N.E.2d at 1016 (citing Fairrow v. Fairrow, 559 N.E.2d 597 (Ind. 1990)).

168. *See* IND. CODE § 16-37-2-2.1 (2008) (requiring mother and putative father to complete sworn statements within paternity affidavit that the man is the biological father); *id.* § 31-14-10-1 (requiring "[u]pon finding that a man is the child's biological father, the court shall, in the initial determination, conduct a hearing to determine the issues of support, custody, and parenting time"); *id.* § 31-14-11-1.1 (providing "[i]n a paternity proceeding, the court shall issue a temporary order for child support if there is clear and convincing evidence that the man involved in the proceeding is the child's biological father").

169. *Id.* § 16-37-2-2.1(b)(1)(B).

170. *Id.* § 16-37-2-2.1(e)(1).

171. *Id.* § 16-37-2-2.1(e)(2).

172. *Id.* § 16-37-2-2.1(m).

173. *See id.* § 31-14-2-1 ("A man's paternity may only be established: (1) in an action under this article; or (2) by executing a paternity affidavit. . . .").

174. Paternity Affidavit, State Form 44780, Ind. State Dep't of Health (on file with author).

175. *Id.*

176. IND. CODE § 16-37-2-2.1 (h), (i), (k) (2008).

the importance of finality in judgments,[177] the legislative limitation on revocation is based on the best interests of the child.[178] The Indiana Supreme Court has noted the significance of stability and finality in family relationships.[179] The court tempered the importance of that state objective by noting, "[p]roper identification of parents and child should prove to be in the best interests of the child for medical or psychological reasons."[180]

A court may revoke an affidavit if the legal father files an action with the court to request a genetic test within sixty days of the date of the affidavit, and the test establishes that he is not the biological father.[181] The revocation may occur outside of the sixty day period only for "fraud, duress, or material mistake of fact" in the execution of the affidavit or if a court-ordered genetic test excludes the legal father as the biological father.[182]

Even if the father and mother sign a false paternity affidavit with the mutual knowledge that the man is not the biological father, the court may not rescind the affidavit.[183] There is no fraud or mistake in the execution of such paternity affidavits because both parties were aware that he was not the biological father at the time of signing.[184] Therefore, no valid statutory reason exists for setting aside the paternity affidavit outside of the sixty days.[185] The Indiana Court of Appeals has ruled that filing a petition to disestablish paternity is contrary to public policy, and the Indiana Code does not provide for such an action.[186] Indiana strives to avoid disestablishment of paternity until paternity has been established in another man to prevent creating an illegitimate child in the eyes of the law.[187]

Despite the paternity affidavit acknowledging legal paternity, another man

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177. Lehr v. Robertson, 463 U.S. 248, 266 (1983).

178. *In re* Paternity of H.H., 879 N.E.2d 1175, 1178 (Ind. Ct. App. 2008) (refusing to change the legal status of a father who signed the paternity affidavit with the knowledge that he was not the biological father because it would not be in the best interests of the child to remove the only father the child had known).

179. *In re* Paternity of S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992).

180. *Id.*

181. IND. CODE § 16-37-2-2.1(h), (k) (2008).

182. *Id.* § 16-37-2-2.1(i), (k).

183. *See In re Paternity of H.H.*, 879 N.E.2d at 1176.

184. *See id.* at 1177-78 (finding no fraudulent execution if both parties knew he was not the biological father); *In re* Paternity of R.C., 587 N.E.2d 153, 155 n.2 (Ind. Ct. App. 1992) (defining extrinsic fraud as the mother's false statement to the father, thereby procuring his signature attesting that he is the biological father).

185. *See* IND. CODE § 16-37-2-2.1(i) (2008).

186. *See In re* Paternity of H.J.B., 829 N.E.2d 157, 159-60 (Ind. Ct. App. 2005); *In re* Paternity of B.W.M., 826 N.E.2d 706, 708 (Ind. Ct. App. 2005) (expressing strong disapproval of legal father's petition to vacate his child support order after learning he was not the child's biological father).

187. *See In re Paternity of H.J.B.*, 829 N.E.2d at 160.

may file an action to establish his own paternity.[188] For example, imagine Mary and Pete complete a paternity affidavit in Indiana. Both Mary and Pete know that Pete is not the biological father when they execute the affidavit. David learns of the birth of Mary's child, and he believes that he is the biological father. David may file a paternity action.[189] Establishing that Pete is not the biological father will not revoke the paternity affidavit unless Pete requests genetic testing for himself within sixty days of the execution of the affidavit.[190] David will not become the legal father if Pete does not want to rescind his affidavit.[191] "A paternity affidavit may not be rescinded unless the court, at the request of the legal father, has ordered a genetic test, and the court-ordered test indicates that the man is excluded as the father of the child."[192] Particularly if Pete signed the affidavit with the knowledge that he was not the biological father, he may be unwilling to voluntarily give up his legally protected relationship with the child. As long as Pete wants to continue to be the legal father, David seems to have no recourse under the current law.

Some courts will find that David is the biological father, but he still is not the legal father.[193] First, the court will consider whether it is in the best interests of the child to adjudicate the biological father's existence.[194] The court considers the child's age, whether the child knows that David is his biological father, and whether it is in his best interests to visit with David.[195] The court makes this determination on a case-by-case basis,[196] and the biological father has no guarantee that the court will recognize his biological connection.

IV. PROBLEMS WITH INDIANA'S CURRENT STATUTORY FRAMEWORK

Indiana denies many unwed fathers their right to due process. The current

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188. *See In re* Paternity of N.R.R.I., 846 N.E.2d 1094, 1097 (Ind. Ct. App. 2006).

189. IND. CODE § 31-14-4-1 (2008).

190. *Id.* § 16-37-2-2.1 (Subsection (k) provides, "The court may not set aside the paternity affidavit unless a genetic test ordered under subsection (h) or (i) excludes the person who executed the paternity affidavit as the child's biological father." Subsection (h) only allows rescission if the male signor requests a genetic test within sixty days of the signing of the affidavit. Subsection (i) permits rescission of the affidavit past sixty days for "fraud, duress, or material mistake of fact" and if the male signor requested a genetic test, and the results indicate that he is not the biological father.). *But see N.R.R.I.*, 846 N.E.2d at 1097 n.3 (suggesting that if genetic tests prove another man is the biological father and exclude the legal father as the biological father, then the court may set aside the paternity affidavit).

191. *See* IND. CODE § 16-37-2-2.1 (2008).

192. *In re* Paternity of M.M., 889 N.E.2d 846, 849 (Ind. Ct. App. 2008).

193. Interview with Master Comm'r Alicia Gooden, Presiding Judicial Officer over Paternity Div. of Marion Circuit Court, in Indianapolis, Ind. (Feb. 6, 2009).

194. *Id.*

195. *Id.*

196. *Id.*

procedure for paternity determination has a high risk of error,[197] and the interests at stake for the father outweigh the government's interests. The Due Process Clause of the Fourteenth Amendment[198] requires more accurate procedures.[199] Biological fathers also do not receive notice that another man is assuming legal paternity of their biological child.

Indiana's current paternity system also violates the biological father's substantive due process rights by allowing state interference with the development of the constitutional right to parent. The current procedures interfere with the biological father's ability to establish a relationship with his child, and according to U.S. Supreme Court precedent, Indiana may deny the biological father's interest in his child for failure to establish a relationship with his child.[200]

A. Procedural Due Process

Procedural due process requires at a minimum "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[201] When determining whether a state's procedures violate a person's right to due process, the courts must consider whether the Fourteenth Amendment protects the interests at stake.[202] If the Fourteenth Amendment protects the interests, then the court must consider what procedures will satisfy due process.[203] Additionally, if the outcome of a proceeding is to be final, due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[204]

1. Procedural Requirements.—The U.S. Supreme Court in *Mathews v. Eldridge* laid out three factors to determine "the specific dictates of due process":[205]

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest,

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197. *See supra* Part III.C.

198. U.S. CONST. amend. XIV, § 1.

199. *See* Mathews v. Eldridge, 424 U.S. 319, 336-40 (1976) (discussing the complex administrative procedures for discontinuing Social Security payments and finding them inadequate).

200. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

201. *Mathews*, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

202. Ingraham v. Wright, 430 U.S. 651, 672 (1977).

203. *Id.*

204. Armstrong v. Manzo, 380 U.S. 545, 550 (1965); *see Lehr*, 463 U.S. at 273 (White, J., dissenting) (noting that "the right to be heard is one of the fundamentals of that right [due process], which 'has little reality or worth unless one . . . can choose for himself whether to appear or default, acquiesce or contest'" (quoting Schroeder v. City of New York, 371 U.S. 208, 212 (1962))).

205. *Mathews*, 424 U.S. at 335.

including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[206]

First, a putative father has both liberty and property interests at stake in a paternity determination.[207] Indiana courts have indicated that public policy is in favor of allocating child support obligations to the biological father.[208] The signor of a paternity affidavit has an interest in ensuring that he is the biological father prior to paying the child support that is likely to result from a paternity adjudication. Even if the mother chooses not to pursue child support obligations,[209] if a man is the legal father, it may affect his obligation to pay birthing expenses,[210] to provide health coverage,[211] and the intestate distribution of his property upon his death.[212] The putative father also has an interest in the parent-child relationship that will result.[213]

Second, Indiana's current paternity procedures pose a high risk of "erroneous deprivation"[214] of the father's interests. If a man, believing he is the biological father, completes the paternity affidavit at the hospital, and genetic tests later prove a different man is the biological father, the court may set the affidavit aside for fraud or mistake of fact.[215] The court, however, can never remedy the man's loss of property in child support payments and the emotional toll on the child and father.[216] With neither genetic testing nor any evidence beyond the parties' statements of the signor's biological relation required, the risk of erroneous deprivation is extremely high.

Due process also requires that any additional procedural safeguards justify

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206. *Id.*

207. *See* Rivera v. Minnich, 483 U.S. 574, 583-84 (1987) (Brennan, J., dissenting).

208. *See In re* Paternity of Davis, 862 N.E.2d 308, 313-14 (Ind. Ct. App. 2007) (quoting *In re* S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992)).

209. *See* IND. CODE § 16-37-2-2.1(g)(2)(A) (2008) (indicating that the execution of a paternity affidavit gives the mother the right—not the obligation—to pursue a child support order).

210. *See In re* Paternity of A.R.S.A., 876 N.E.2d 1161, 1164-65 (Ind. Ct. App. 2007) (requiring unmarried legal father to reimburse Medicaid for one-half of mother's birthing expenses).

211. IND. CODE § 16-37-2-2.1(g)(2)(A) (2008).

212. *See id.* § 29-1-2-7(b)(5) (2004) (providing that a court shall treat a nonmarital child for purposes of intestate inheritance as if the father had married the mother if the father executes a paternity affidavit); *id.* § 29-1-2-1(d)(1) (establishing the intestate share for children of the intestate).

213. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

214. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

215. *See, e.g.*, *In re* Paternity of R.C., 587 N.E.2d 153, 157 (Ind. Ct. App. 1992) (overturning paternity judgment because of fraud in the context of an adjudication of paternity).

216. IND. CODE § 16-37-2-2.1(i) (2008); *see In re Paternity of R.C.*, 587 N.E.2d 157 (overturning a paternity judgment because of fraud by the mother).

the cost.[217] States must follow the mandates of Title IV-D, or the state will lose federal funding.[218] The state must provide for non-judicial, "expedited"[219] procedures to establish paternity, including a hospital-based program "focusing on the period immediately before or after the birth of the child."[220] Despite the security mandatory genetic testing would provide, the Office of Child Support Enforcement declared that states must allow for voluntary acknowledgements of paternity to establish paternity without any further proceedings.[221] States cannot require mandatory genetic testing under Title IV-D. Consequently, the state may not discontinue the expedited procedures completely or require mandatory genetic testing. Indiana must balance the need to protect the putative father's right to due process against the need to receive federal funding.

The third *Mathews* factor is the "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[222] The state's interest in "efficacious procedures to achieve legitimate state ends" is a recognizable state interest.[223] However, the Supreme Court has recognized "higher values than speed and efficiency."[224] In *Stanley v. Illinois*, the Supreme Court noted: "[T]he Bill of Rights in general, and the Due Process Clause in particular, . . . were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy . . . ."[225] The procedures used to establish paternity in a hospital reflect the need for constitutional protection from the "overbearing concern for efficiency and efficacy."[226] The days and hours following the birth of a child are likely to be stressful and emotional. The state's process for immediate paternity acknowledgement in order to allow child support payments to flow as swiftly as possible seems to be the precise type of governmental action the Due Process Clause protects against. Despite the state's need to increase child support payments, due process concerns require a more balanced and thoughtful procedure to ensure all parties' rights are protected.

A marriage certificate or a paternity affidavit should not trump a genome. The law should not underplay the importance of a biological connection. The Supreme Court has recognized the significance of a biological link and an established relationship.[227] This connection is one of the most unique of a child's life. No piece of paper should outweigh the magnitude of this connection. Indiana law should allow the biological father and the child the opportunity to

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217. *See* Ingraham v. Wright, 430 U.S. 651, 680 (1977).
218. Cacioppo, *supra* note 151, at 481.
219. 42 U.S.C. § 666(a)(2) (2006).
220. *Id.* § 666(a)(5)(C)(ii).
221. *See* Cacioppo, *supra* note 151, at 503-04 & n.152.
222. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
223. Stanley v. Illinois, 405 U.S. 645, 656 (1972).
224. *Id.*
225. *Id.*
226. *See id.*
227. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

develop a relationship before labeling him deadbeat and unfit.[228] Due process demands that the biological father receives the opportunity to be heard before depriving him of his child.[229] A later paternity suit, after another man is the legally established father, that has minimal hope of giving the biological father a legally recognized position in the child's life will not satisfy the deprivations of the current law. The Fourteenth Amendment demands more.[230]

2. Notice.—One of the fundamental requirements of due process is notice.[231] Title IV-D requires that the state procedures for administration of voluntary acknowledgement of paternity must include notice to the mother and putative father "orally, or through the use of video or audio equipment, and in writing, of the alternatives to, the legal consequences of, and the rights . . . and responsibilities that arise from, signing the acknowledgment."[232] Indiana's paternity affidavit statute requires hospital personnel to "verbally explain . . . the legal effects of an executed paternity affidavit,"[233] namely, that executing the paternity affidavit "establishes paternity"[234] and "gives rise to parental rights and responsibilities," including possible child support obligation.[235] The form does not disclose the sixty day deadline to request genetic testing.[236] The form also does not disclose any of the alternatives to signing this document, such as going to the health department[237] after a genetic test establishes his biological paternity or filing an action to establish paternity under Indiana Code section 31-14-4-1.[238]

Hospital personnel will generally inform the signor that the document is a legal document that is legally enforceable and may give rise to child support obligations.[239] The hospital personnel will not place his name on the birth certificate without an executed paternity affidavit,[240] and most fathers present at

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228. This Note does not suggest that women must disclose all of their sexual partners to prevent a father from not knowing about the child. This Note suggests that the father should receive more opportunity to come forward if he learns of the birth before the state severs the biological relationship. *See infra* notes 279-328 and accompanying text.

229. *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (describing the hearing requirement in the context of deprivation of a property interest).

230. *See* U.S. CONST. amend. XIV, § 1; *Mathews*, 424 U.S. at 333.

231. *See* Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

232. 42 U.S.C. § 666(a)(5)(C)(i) (2006).

233. IND. CODE § 16-37-2-2.1(b)(2) (2008).

234. *Id.* § 16-37-2-2.1(g)(1).

235. *Id.* § 16-37-2-2.1(g)(2)(A).

236. Paternity Affidavit, State Form 44780, Ind. State Dep't of Health. (on file with author).

237. *Id.*; *see* IND. CODE § 16-37-2-2.1(a)(2) (2008).

238. IND. CODE § 31-14-4-1 (2008) (providing procedure to file a judicial paternity action).

239. Telephone Interview with Becky Stull, Birth Registrar, Postpartum Dep't, Home Hospital, in Lafayette, Ind. (Nov. 19, 2008); Telephone Interview with Betty Judd, Birth Registrar, Dep't of Newborn Records, Clarian Health Partners: Methodist Campus, in Indianapolis, Ind. (Nov. 19, 2008).

240. 42 U.S.C. § 666(a)(5)(D)(i) (2006).

birth will choose to complete an affidavit.[241] As a result, the father is completing a legally binding document in the hospital within seventy-two hours of the birth of the child without full disclosure of his rights.[242]

Current Indiana law requires a more complete disclosure of rights to waive a spousal elective share under a will[243] or to borrow money from a bank[244] than to assume full, complete parental obligations.[245] In *In re Paternity of E.M.L.G.*,[246] the Indiana Court of Appeals held that not knowing the legal effects of the paternity affidavit is not a valid reason to revoke the affidavits.[247] Additionally, a court will not revoke a paternity affidavit for failure of the hospital to provide the statutorily dictated verbal explanation of the legal effects of the document.[248] Despite the fact that Title IV-D, Indiana Code section 16-37-2-2.1(b)(2), and the Fourteenth Amendment require explanation of the legal effects of a document prior to signing it, Indiana courts will not set aside a paternity affidavit for the failure to explain the legal ramifications[249] or for the signor's lack of understanding of the effects.[250]

Indiana courts have justified upholding paternity affidavits when the signor knew he was not the biological father because the signor has voluntarily assumed the obligations of financial and emotional support for the nonmarital children.[251] Given Title IV-D's goal of reducing welfare costs and Indiana's strong policy of establishing paternity for nonmarital children,[252] the State is logically eager to allow any man to assume paternity. However, the State should not codify procedures that encourage people to assume lifelong obligations without full disclosure of the ramifications of the document he is signing. Even if the signor knows generally what it means to become a parent, he may assume that if he is

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241. Telephone Interview with Becky Stull, *supra* note 239.

242. IND. CODE § 16-37-2-2.1(c)(1) (2008).

243. *See* Taylor v. Taylor, 643 N.E.2d 893, 897 (Ind. 1994) ("The right of election of a surviving spouse given under [Indiana Code section 29-1-3-1 (Burns 1989)] . . . may be waived . . . after full disclosure of the nature and extent of such right . . . .") (citing IND. CODE § 29-1-3-7 (Burns 1989)).

244. *See* 15 U.S.C. § 1601(a) (2006) (requiring the "meaningful disclosure of credit terms"); IND. CODE § 24-4.5-2-301 (2007) (adopting the requirements of the Federal Consumer Credit Protection Act, 15 U.S.C. § 1601-1693r).

245. *See* Rivera v. Minnich, 483 U.S. 574, 583-84 (1987) (Brennan, J., dissenting) ("What is at stake for a defendant in such a [paternity] proceeding . . . is the imposition of a lifelong relationship with significant financial, legal, and moral dimensions. . . . A paternity determination therefore establishes a legal duty whose assumption exposes the father to the potential loss of both property and liberty.").

246. 863 N.E.2d 867 (Ind. Ct. App. 2007).

247. *Id.* at 869.

248. *In re* Paternity of M.M., 889 N.E.2d 846, 849 n.1 (Ind. Ct. App. 2008).

249. *Id.*

250. *See In re Paternity of E.M.L.G.*, 863 N.E.2d at 869.

251. *See In re* Paternity of H.H., 879 N.E.2d 1175, 1177-78 (Ind. Ct. App. 2008).

252. *See In re Paternity of E.M.L.G.*, 863 N.E.2d at 869.

not the biological father, the affidavit is no longer valid. He may also assume that if he and the mother end their relationship, his child support obligations would end if he is not a biological parent.

B. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'"[253] The interest at stake in paternity determinations is a father's right "to 'the companionship, care, custody, and management of his . . . children.'"[254] This interest comes within the purview of the Fourteenth Amendment's protection.[255] However, a biological relationship alone will generally not rise to the level of a fundamental liberty interest protected by the Fourteenth Amendment.[256] Courts give some weight to the biological relationship between a father and child, but biology alone is not enough.[257] The father must have acted to create a relationship with his child.[258] The courts have sought to protect the familial relationship that develops between parent and child.[259] Until the biological father substantively enters the child's life as a parental figure and establishes a relationship with the child, he has no constitutionally protected interests in that child.[260]

The impermissible infringement on the biological father's right to parent occurs when the state prevents the father from establishing a parental relationship that a court will recognize. If any man may voluntarily assume the obligations of fatherhood within hours of a child's birth at the hospital, then a biological father may lose the prospect of a relationship with his biological child because the mother chose not to tell him that she was pregnant. He cannot reasonably act on something he did not know existed.

The mother may also act as a gatekeeper[261] by restricting the father's access to the child.[262] Like the father in *Quilloin v. Walcott*, the law will deprive this

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253. Troxel v. Granville, 530 U.S. 57, 65 (2000) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

254. M.L.B. v. S.L.J., 519 U.S. 102, 118 (1996) (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)).

255. *See id.* at 119; Santosky v. Kramer, 455 U.S. 745, 753 (1982).

256. *Lehr*, 463 U.S. at 259-61.

257. *Id.* at 262.

258. *Id.*

259. *See id.*

260. *Id.* at 261.

261. Lawrence M. Berger et al., *Parenting Practice of Resident Fathers: The Role of Marital and Biological Ties*, 70 J. MARRIAGE & FAM. 625, 627 (2008) (defining maternal gatekeeping as "regulation of fathers' access to and time with children").

262. *See* Natasha J. Cabrera et al., *Why Should We Encourage Unmarried Fathers to Be Prenatally Involved?*, 70 J. MARRIAGE & FAM. 1118, 1120 (2008) ("[M]other's gatekeeping may help to alienate the father from her and the child and reduce his level of involvement over time.");

biological father of his interest in his child because he failed to establish a relationship with the child,[263] but the mother may have been a significant factor in his inability to assume the parental role.[264] The only reason for his loss of constitutional protection is the fact that the mother and father were no longer intimately involved, a situation that is now commonplace.[265]

The Indiana Court of Appeals justified the interference with the biological father's rights using the best interests of the child standard:

> In short, the decisions of this state reveal the "best interests" standard has not been employed to make vague moral judgments about alternative lifestyles and parental fitness. Instead, the process of effecting that which is "in the best interests of the child" has in fact been an effort by our courts to preserve, and in some instances create, an environment conducive to the mental and physical development of the child—an environment which, to the extent possible, meets the "need of every child for unbroken continuity of affectionate and stimulating relationships with an adult." As such, the "best interests" test without question forwards a compelling state interest which justifies the resultant interference with the rights of the biological parents.[266]

Using the best interests of the child standard to deny the father the opportunity to develop a relationship is in fact making the "vague moral judgments about alternative lifestyles and parental fitness" that the Indiana Court of Appeals denied applying.[267] If the mother and father are married at the time of birth, even if the father is living apart from the mother and has done nothing to contribute to the pregnancy, he is the presumed father under the law.[268] If the parents are unmarried, then the father must take proactive steps to establish a parental relationship.[269] The law is making moral judgments about the ideal family

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Rebecca M. Ryan et al., *Longitudinal Patterns of Nonresident Fathers' Involvement: The Role of Resources and Relations*, 70 J. MARRIAGE & FAM. 962, 965 (2008) ("[S]ome mothers insists fathers pay formal or informal child support to gain access to the child, suggesting either that fathers' motivation to remain involved may drive financial investment or simply that fathers' ability and *willingness* to pay child support may determine his *ability* to be involved." (citation omitted)).

263. *See* Quilloin v. Walcott, 434 U.S. 246, 254 (1978).

264. *See* Interview with Master Comm'r Alicia Gooden, *supra* note 193 (noting that the mother is often the reason why everyone is in "this mess").

265. Berger et al., *supra* note 261, at 625 (noting a 2005 study found that about thirty-seven percent of births were to unmarried women, and "few unmarried parents will marry each other after their baby's birth").

266. *In re* Joseph, 416 N.E.2d 857, 861 (Ind. Ct. App. 1981) (quoting J. GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 6 (1973)).

267. *Id.*

268. *See* IND. CODE § 31-14-7-1 (2008); *see also* Michael H. v. Gerald D., 491 U.S. 110, 115 (1989).

269. Lehr v. Robertson, 463 U.S. 248, 261-62 (1983).

structure and is punishing those who do not fit.[270] People cannot have the liberty secured to them by the Fourteenth Amendment if the courts interpret the Constitution based on its view of the ideal family.[271]

A state may only interfere with a fundamental right if it is advancing a compelling state interest.[272] Few would deny that the state has a compelling interest in protecting children. If the father were abusing or neglecting his children, then the state would have a compelling interest in removing the children from the father's custody.[273] In most cases where the unmarried father loses his right to his children, the state has not shown that it is in the best interests of the child to terminate his rights.[274] The state assumes the father is unfit and deprives him of his children. In *Quilloin v. Walcott*, the U.S. Supreme Court found that state interference with a "natural family" without a showing of unfitness would violate the Due Process Clause.[275] Modern society no longer has a prototypical natural family model.[276] Continuing to use the justification that the biological father is not a part of the "protected family unit"[277] is a blatant refusal to consider social reality, and it is certainly not a sufficiently compelling state interest to justify denying a father the right to parent or to even know his child.[278]

V. PROPOSED SOLUTIONS

Indiana must do more to protect father's rights. Indiana should balance the interests of everyone involved while staying within the mandates of Title IV-D. Due to the potentially harsh outcome that can result if another man voluntarily signs a paternity affidavit for a child that is not biologically his own, Indiana must

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270. *See generally* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496 (1992) (describing how the law "promotes social institutions" such as marriage and parenthood).

271. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding a statute prohibiting interracial marriage unconstitutional).

272. *In re Joseph*, 416 N.E.2d at 859.

273. *Id.* at 860.

274. His rights are terminated by another man's execution of the paternity affidavit or by his failure to learn of the pregnancy. *See infra* Parts III.B-C.

275. Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

276. *See* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Marking: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 259 (2009) (describing the "radically changing conceptions of family and of the relationships possible between children and parents").

277. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

278. *See id.* at 156-57 (Brennan, J., dissenting) (noting the majority's opinion is surrounded by an atmosphere of "make-believe" and does not reflect social reality); Berger, *supra* note 276, at 259 ("Though family structure is undergoing 'a sea-change,' family law remains tethered to culturally embedded stories and symbols. While so bound, family law will fail to serve individual families and a society whose family structures diverge sharply by education, race, class, and income." (quoting WILLIAM SHAKESPEARE, THE TEMPEST act 1, sc. 2 (1623)).

put in place increased procedural safeguards to ensure the biological father has the opportunity to assume the rights if he should choose to do so. Emphasizing genetic testing prior to execution of a paternity affidavit, ensuring proper notice prior to signing, providing for dual fatherhood, and creating an enhanced putative father registry will help Indiana continue to hold men financially responsible for their children while allowing every member of the modern family's constitutional rights to survive.

A. Greater Emphasis on Genetic Testing in the Hospital and Increased Notice Prior to Signing

Indiana's paternity statutes have established the state's preference for biological fathers to assume the responsibilities of their nonmarital children.[279] The U.S. Supreme Court has also suggested that the ideal situation for a nonmarital child is for her biological father to have an emotional relationship with her.[280] Indiana should make every effort to ensure that only the biological father signs the paternity affidavit.

Using modern technology, a father can definitively determine whether he is a child's biological father.[281] Mandatory genetic testing at birth would virtually eliminate later paternity suits and the threat of future paternity disestablishment.[282] However, Congress chose not to require mandatory genetic testing under Title IV-D to keep the paternity acknowledgement process simple, and states cannot require mandatory genetic testing under Title IV-D.[283] Nevertheless, hospital personnel can strongly encourage genetic testing prior to signing the paternity affidavit without compromising the goals of Title IV-D.[284]

Many fathers may feel reluctant to question their paternity in the hospital room with the new baby and its mother present. These fathers may feel that the mother and hospital personnel will assume that they are trying to shirk their responsibility if they request genetic testing.[285] Talking confidentially to the father outside of the hospital room and informing him of the advantages of genetic testing may ease some of his discomfort.

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279. *See supra* notes 168-71 and accompanying text.

280. *See supra* note 96 and accompanying text.

281. *See* Paternity Test, http://www.dnacenter.com/paternity/legal-testing.html (guaranteeing 99.99% probability of paternity for inclusions and 100% probability of exclusion) (last visited Mar. 1, 2009).

282. *See* Cacioppo, *supra* note 151, at 503.

283. *See id.* at 503-05.

284. *See id.* at 488 & n.58 (noting that the Office of Child Support Enforcement "strongly recommended" including "[a]n advisory to parents that they may wish to seek legal counsel or obtain a genetic test before signing").

285. *See* Rivera v. Minnich, 483 U.S. 574, 585 (1987) (Brennan, J., dissenting) (emphasizing that "the losing defendant in a paternity suit is subject to characterization by others as a father who sought to shirk responsibility for his actions"). Though a paternity suit and the execution of a paternity affidavit are procedurally distinct, the concerns for the father are similar.

Fathers currently receive minimal notice of the effect of signing the affidavit, beyond the fact that it is a legal document.[286] The affidavit itself does not disclose the sixty-day window for requesting a genetic test.[287] The key to rectifying the current procedure is to require full disclosure, promote consultation with an attorney prior to signing, and encourage genetic testing.

Prior to signing the paternity affidavit, the father must either request genetic testing or sign that he is waiving genetic testing prior to executing the affidavit. Such a procedure would not require genetic testing in contravention of federal requirements,[288] but would notify the father that genetic testing is available and recommended. The affidavit and the hospital personnel or attorney must notify the father of his right to request genetic testing within sixty days and the resulting waiver of that right outside of the sixty day period. Hospital personnel or an attorney must make the detailed effects of the document clear to him at the time of signing. Without full disclosure, his consent is not truly informed. The law should not bind a man for two decades based on a one page document that does not fully explain the ramifications of signing it.

B. Recognition of Dual Fatherhood

The idea of one mother and one father is a remnant of the past.[289] The modern family has evolved into numerous varieties.[290] The modern reality is "[O]nly one-quarter of American households fit the marital family ideal of married parents with children."[291] Many children have had some kind of "social parent"[292] prior to reaching the age of majority.[293] The state should consequently recognize dual fatherhood in certain situations. Dual fatherhood might appear unworkable and unduly complicated. However, social reality reflects that modern families are complicated, and the law should strive to reflect modern reality.[294]

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286. *See supra* notes 231-42 and accompanying text.

287. *See supra* note 236 and accompanying text.

288. *See supra* notes 217-22 and accompanying text.

289. *See* Berger et al., *supra* note 261, at 625-26 (discussing the changing "family demography" within the last fifty years).

290. *See* Troxel v. Granville, 530 U.S. 57, 63-64 (2000) (noting the difficulty in describing the "average American family").

291. Berger, *supra* note 276, at 281.

292. *See* Berger et al., *supra*, note 261, at 625-26 (defining a social parent as "a married or cohabitating partner of a child's biological parent (usually mother) to whom the child is not biologically related").

293. *Id.* at 625 ("[E]stimates from the mid-1990s show that approximately one third of children in the United States will spend time living with a social parent during childhood[.]"). This figure is likely higher now due to the increased nonmarital birth rate and divorce rate. *See supra* note 7 and accompanying text.

294. *See* Kisthardt, *supra* note 12, at 599-600 (noting in the context of a step-parent adoption, "The law's refusal to afford parental-type rights to more than one 'father' sets up a situation in which 'rights' may be vindicated, but 'interests' are not necessarily accommodated and

Indiana already recognizes a form of dual paternity in some situations. In *Schaffer v. Schaffer*,[295] the Indiana Court of Appeals allowed visitation by the stepfather who was the named father on the birth certificate.[296] The mother and stepfather divorced, and the stepfather received visitation rights.[297] One year later, the biological father also received visitation rights and a child support order.[298] The appellate court allowed the visitation rights of both fathers, neither of whom were currently in a romantic relationship with the mother.[299]

Dual fatherhood is in the best interests of the child and the state. The child in *Quilloin v. Walcott* wanted his stepfather to adopt him, but he also wanted visitation with his biological father.[300] Dual paternity would have resolved this issue and protected the interests of both fathers and the child. The only danger is the conflict that may arise over child support obligations and visitation rights. Proper planning and a clear statement of each parent's rights will resolve any ambiguity as to parental rights.

Under a dual paternity scheme, the law would recognize a primary and a secondary father.[301] The primary father would be the dominant paternal figure in the child's life. The biological father should be the primary father if he asserts his rights early. Allowing the biological father to be the primary father reflects Indiana's preference for the biological father to establish his paternity.[302] It also conforms to the Supreme Court's holding in *Lehr v. Robertson*, whereby the biological father has a constitutionally recognized interest in his child only if he develops a relationship with the child.[303]

If the biological father has a genetic test performed at the hospital that establishes his paternity, and he signs the paternity affidavit, then he is unquestionably the primary father. If the father waives a genetic test at the hospital, the paternity affidavit should stipulate that he will be the primary father only if the biological father does not come forward within six months of the execution of the paternity affidavit. If the biological father comes forward after six months, then the biological father will be the secondary father. The legal father would remain the primary father despite his lack of biological connection. In this scenario, the best interests of the child demand recognition of the established social relationship over biology.

Regardless of when the biological father comes forward, he should have a cognizable legal interest in a relationship with the child, unless it is clearly not in

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relationships are not fostered.").

295. 884 N.E.2d 423 (Ind. Ct. App. 2008).

296. *Id.* at 424-25.

297. *Id.* at 424.

298. *Id.* at 425.

299. *Id.* at 425, 429.

300. Quilloin v. Walcott, 434 U.S. 246, 251 n.11 (1978).

301. This discussion presumes the mother has physical custody of the child. The legislature would need to address the parental rights if the primary father had physical custody of the child.

302. *In re* S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992).

303. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

the child's best interest to grant visitation. The determination of whether it is in the best interests for the child to have a legal relationship with the biological father must involve similar considerations as any parental rights termination proceeding.[304] The biological father will therefore always have a protected interest in the child at any time, unless he is abusive or neglectful.[305] His failure to come forward immediately after the birth will not result in a blanket denial of a relationship with the child.

For dual paternity to work effectively, the court must carefully assign the rights of each parent involved, particularly in regard to child support, parenting time, and decision-making regarding the child's life. The proposed scheme is only one possible breakdown.[306]

1. Child Support.—If there is no secondary father, the primary father would pay one hundred percent of the child support. If there are two legal fathers, the primary father would pay seventy-five percent of the child support obligation.[307] A non-residential secondary father would pay the remaining twenty-five percent. If the secondary father resides with the mother, then his gross income would factor into the mother's gross income for purposes of Indiana's child support guidelines rather than forcing him to pay a given amount to the mother every week.[308] The state should base child support payments on the percentage of the total parental bundle that the father receives, including the right to make decisions regarding his child's life. If the father has joint custody and is an equal decision-maker regarding his child, he should pay more child support than a secondary father who receives only visitation.

2. Parenting Time.—The primary father should receive more parenting time with the child than a non-residential secondary father. If the secondary father resides with the mother, then he will not receive any rights to parenting time beyond what the mother receives. If the secondary father does not reside with the mother, then he will only get a portion of what the mother receives. The primary father would have parenting time on every other weekend and for six weeks during the summer.[309] The mother would therefore have custody for the remaining time. A non-residential secondary father, presumably a legal father

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304. *See* Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147-48 (Ind. 2005) (describing the requisite showing prior to termination of parental rights).

305. *See id.*

306. This Note does not address all possible legal issues that may arise with two legal fathers, such as intestate distribution and wrongful death actions. State statutes can easily resolve these issues. The purpose of this section is to illustrate that dual paternity is a workable solution to a complicated problem.

307. This Note refers to child support as court-mandated child support. This Note presumes that child-related expenditures by the mother are voluntary and therefore do not come into the equation.

308. IND. CHILD SUPPORT GUIDELINES, IND. R. OF CT. 1-6, *available at* http://www.in.gov/judiciary/rules/child_support.

309. The state could adjust this if the primary father and mother do not live close to one another. The alternative could be one weekend a month and eight weeks in the summer.

who is now divorced from the mother, would get one weekend a month and three weeks during the summer. The secondary father's share must not decrease the primary father's share.

3. Decisionmaking.—The mother and the primary father make all decisions regarding the child's welfare, including religion, education, and health decisions. The secondary father would not get a vote.

This scenario is more equitable than the current law. Under Indiana's current paternity system, a biological father will never be a legally recognized father unless he both knows about the pregnancy and knows how to exert his rights.[310] If another man executes a paternity affidavit without a genetic test, the biological father has no rights unless the now legal father decides to request a genetic test within sixty days of the paternity affidavit execution.[311] Even if the biological father registers with the current putative father registry—which most fathers likely have no idea exists[312]—he will still not have the right to challenge the paternity affidavit of another man.[313] The biological father therefore may have only a seventy-two hour window to exert his right to parent his child.[314] If the biological father never discovers the pregnancy, he will never have the opportunity to develop the relationship that the Court in *Lehr* demanded.[315] Therefore, through no fault of his own, a father will never know his child. Worse still, an innocent child will never know her father. The justification for this deprivation is that the biological mother and father were no longer intimately involved. Father and child lose out due to circumstances beyond their control.

This system also serves the interests of Title IV-D and the state. Title IV-D's goal is to receive the maximum amount of child support to reduce the welfare toll on the state and federal budgets.[316] With two possible fathers to contribute financially to the child's development, this system doubles the likelihood the child will receive the full child support obligation, possibly more. Two fathers also would give the mother more social resources to aid in the rearing of the child. Having more parents means more extended family to help baby-sit and provide emotional support to the mother.

Title IV-D also demands a "simple civil process" for the voluntary acknowledgement of paternity.[317] If a man wants to be the child's father, then the state may reasonably allow him to do so. This system allows the legal father to acknowledge paternity under a simple civil process without violating the biological father's interests in establishing a relationship with his child and his potential right to parent in the process.

The state may desire to have the traditional family structure composed of one

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310. *See supra* notes 188-96 and accompanying text.
311. *See supra* notes 188-95 and accompanying text.
312. *See* Lehr v. Robertson, 463 U.S. 248, 264 (1983).
313. *See supra* notes 188-96 and accompanying text.
314. *See* IND. CODE § 16-37-2-2.1(c)(1) (2008).
315. *See Lehr*, 463 U.S. at 262.
316. *See* 42 U.S.C. §§ 651, 666(a) (2006).
317. *Id.* § 666(a)(5)(C)(i).

father and one mother, but the state's most important goal should be to provide the child with the most resources possible. Shuffling the child between homes is not ideal, but giving the child the greatest opportunities possible ensures the child will not suffer the "consequences of illegitimacy," such as poverty.[318] Few children will suffer from too much love and attention. As Indiana has adopted the best interests of the child approach to most of its family determinations, this approach certainly makes more sense than the current system.[319] The current system protects the mother and the state more than the child and fathers. The proposed system balances the interests of everyone involved, while protecting the best interests of the child to the maximum extent possible. It also does this without trampling the rights of the fathers.

C. Enhanced Putative Father Registries

When a mother and father knowingly complete a false paternity affidavit, they circumvent the adoption proceedings that the law would otherwise require to assume legal parenthood.[320] Under Indiana's adoption laws, if the father has filed with the putative father registry, he will receive notice of the adoption.[321] Registry provides notice so that he may intervene in the adoption proceeding and present his objections.[322] No similar provision for paternity affidavits exists, even if the father knew of the pregnancy and was able to file with the putative father registry.

The imperfections of the current putative father registry usually prohibit the registry from protecting the biological father's rights. These flaws usually result from the biological father's lack of information. He often does not know of the pregnancy and will likely not know of the registry unless he has consulted with an attorney. Failure to register results in the biological father's implied consent to proceed with the adoption.[323] Lack of knowledge is no defense.[324]

Indiana places the burden of discovery of the pregnancy on the biological

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318. Berger, *supra* note 276, at 281.

319. *See, e.g.*, *In re* Paternity of H.H., 879 N.E.2d 1175, 1178 (Ind. Ct. App. 2008) (applying the best interests of the child standard).

320. A woman who knowingly provides a false name as the biological father commits a Class A misdemeanor. IND. CODE § 16-37-2-2.1(f) (2008). There is no equivalent provision for a man who completes a false paternity affidavit, likely due to the difficulty in proving actual knowledge of the man.

321. *Id.* § 31-19-5-4.

322. *See* Kimberly Barton, Comment, *Who's Your Daddy?: State Adoption Statutes and the Unknown Biological Father*, 32 CAP. U. L. REV. 113, 128 (2003) (noting the purpose of putative father registries is to protect the father's interest by giving him notice, the mother's privacy, and the child's and adoptive parent's interest in a "secure adoption").

323. IND. CODE § 31-19-9-15.

324. *See id.* § 31-19-9-16 (establishing that a putative father may not contest the validity of his implied consent).

father.[325] The mother usually has no duty to reveal her pregnancy to any potential fathers.[326] The assumption behind this is that a father who does not care enough to discover whether a child resulted from his sexual encounter with the mother will likely be an unfit father. The state labels the biological father a deadbeat dad because of his failure to call all former sexual partners to inquire whether a pregnancy resulted. This is an unfair assumption, one that Indiana should certainly not endorse. It is unrealistic to assume that sexual partners who are no longer intimately involved will contact each other to inquire whether a pregnancy has resulted. Failure to do something that few people actually do should not constitute implied abandonment of his child.

If Indiana continues to place the burden of discovery on the biological father, then it must work more diligently to protect the father's rights. The legislature should adopt an expanded version of the putative father registry. This expanded model will give the putative father notice of adoption proceedings or execution of paternity affidavits related to a child born to the mother. The registration process must be simple, such as registry via phone or by the submission of an online document. To register as a putative father, the father would need to have the mother's first and last name in addition to at least one unique identifier, such as middle initial, birth date, or social security number. The putative father may provide as much information as possible to ensure proper notice. The state would link the registry to the health department database of all live births. If the mother has a live birth within twelve months of the registration, the putative father will receive notice, allowing him to inquire further if he desires to pursue legal paternity. The registration will expire at twelve months from the date of the registration. If the mother and putative father have another sexual encounter in that time period, he will have the option to renew his registration. Upon a live birth by the mother, the hospital or health department will strongly encourage a genetic test by the putative father. If more than one putative father comes forward, the fathers will have to submit to a genetic test before either can complete the paternity affidavit. The registration will also include a time restraint to respond to the notice provided. Thirty days would strike the fairest balance between the state's interest in prompt adoption and expeditious paternity determinations of nonmarital children as well as the nonmarital father's right to pursue a relationship with his child.

The key to an enhanced putative registry's success is advertisement. Fathers must know that they must take affirmative steps to ensure legal rights to their children and that filing with the registry is the easiest means to guarantee the biological father will have access to his child. The state must advertise the registry as much as possible. Reasonably accessible means of advertisement would include posting information online, at high schools and universities, at fatherhood initiative centers, and in government facilities.

Advertisement will necessarily expend state resources. However, the cost of printing flyers or running television or radio advertisements is minuscule

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325. *See In re* Paternity of Baby Doe, 734 N.E.2d 281, 285 (Ind. Ct. App. 2000).

326. *See id.*

compared to the cost of litigation that results when the biological father does not know his rights. The damage to the child when she must endure endless paternity suits is immeasurable.[327] Advertisement may also identify fathers who would not have otherwise known how to come forward, thereby resulting in more child support going to the child. This would certainly further the goals of Title IV-D. The importance of the putative father registry must become public knowledge. Only then will putative father registries actually protect fathers' rights, rather than punishing the fathers for their inability to maneuver a system they did not know existed.

This proposed solution does not ignore the reality that some fathers do not want to assume the responsibilities of fatherhood. However, the majority of fathers will attempt to remain involved in their children's lives,[328] and the behavior of a few should not justify depriving the fathers who want to be involved the opportunity to do so. Indiana must still give them the chance to make that decision. The biological father must have the right of first refusal before any other man may take his place.

CONCLUSION

Indiana cannot change existing Supreme Court precedent, and Title IV-D is likely here for the foreseeable future. However, Indiana can change the unjust, and often unconstitutional, treatment of the unwed father. The Indiana legislature must adopt the dual paternity structure as well as the enhanced, heavily advertised putative father registry to protect nonmarital father's constitutionally protected rights. Additionally, hospital personnel and the health department must promote genetic testing and the right to an attorney prior to the execution of a paternity affidavit. The paternity affidavits must disclose the sixty-day deadline to request a genetic test and provide a full explanation of the legal ramifications of signing the document. If the father wants to sign the affidavit in the hospital, an independent third party should consult with him in a neutral environment away from the mother and child.

If Indiana adopts all of these suggestions, fewer fathers will suffer the consequences of ignorance of the law. Fewer children will have their biological heritage stripped from them. It is easy to say that fathers should know better, and if they really wanted to be involved in a potential pregnancy, they would have stayed connected to the mother. It is easy to stereotype the deadbeat dad and assume that all fathers who do not reside with the mother do not care about their children. That could not be farther from the truth. The law itself drives a wedge into one of the most precious bonds a person can ever experience. This must not

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327. *See* David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 137 (2006).

328. *See* Natasha J. Cabrera et al., *Explaining the Long Reach of Fathers' Prenatal Involvement on Later Paternal Engagement*, 70 J. MARRIAGE & FAM. 1094, 1096 (2008) (noting that "[m]any men who become fathers commit to 'being there' for their children and vow to make significant changes" and describing several variables that often impact the father's involvement).

continue.

When the Indiana legislature next convenes to discuss child support enforcement with the "Let's get those deadbeats" vigor, each legislator should consider what it would feel like to know you have a child that you never even had the chance to get know. Someone else made the choice for you. Someone else decided you were not good enough to be a parent. Perhaps then, Indiana's perspective would change. No one deserves less than a chance to get to know their children or their fathers.